TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 349

OLD COLONY RAILROAD COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,163)

( )

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[fols. a-1] [Caption omitted]

BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 18813

OLD COLONY RAILROAD COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Petitioner: Jos. D. Brady, Esq., J. S. Y. Ivins, Esq.
For Respondent: A. H. Fast, Esq., A. H. Murray, Esq., Lionel A. Norman, Esq.

DOCKET ENTRIES

1926.

July 23. Petition received and filed.
July 24. Copy of petition served on Solicitor.
July 24. Notification of receipt mailed taxpayer.
Sept. 21. Answer filed by General Counsel.
Sept. 25. Copy of answer served on taxpayer—General Calendar.

[fol. 2]

1928.

Apr. 27. Motion to place on Boston, Mass. Circuit Calendar filed by taxpayer. Granted 4/28/28.
May 31. Hearing date set July 31, 1928—Boston, Mass.
June 18. Notice of appearance of Jos. D. Brady as counsel for taxpayer filed. See 16815.
July 6. Hearing date set 8/3/28—Boston, Mass.
Aug. 3. Hearing had before Mr. Trussell on merits. Taken under submission upon filing of a stipulation on 9/6/28. Stipulation of some facts filed. Briefs due Oct. 15, 1928.
July 25. Answer to amended petition filed by General Counsel in field. Copy served 9/13/28.
July 25. Motion for permission to file amended petition filed by taxpayer. Granted. Amended petition filed with motion.

1928.

Aug. 3. Motion for severance of issues and limitation of hearing to certain issues filed by taxpayer—granted.

Aug. 15. Copy of motion and amended petition served on General Counsel.

Aug. 23. Motion for an extension to Sept. 15, 1928 to file stipulation, filed by taxpayer.

Aug. 24. Granted. Both sides notified.

Aug. 30. Transcript of hearing of Aug. 3, 1928 filed.

Sept. 15. Motion for extension to Nov. 1, 1928 to file stipulation or present motion for the taking of testimony, filed by General Counsel. Granted 9/18/28.

Oct. 13. Motion for extension to Dec. 1, 1928 to file brief filed by General Counsel.

Oct. 16. Motion granted to both parties.

Oct. 27. Supplemental stipulation of facts filed.

Nov. 30. Motion for extension to Jan. 10, 1929 for filing briefs filed by General Counsel. Granted both parties 12/3/28.

[fol. 3]

1929.

Jan. 7. Motion for extension to Jan. 31, 1929 for filing briefs filed by General Counsel. Granted 1/8/29.

Jan. 31. Request for findings and brief filed by taxpayer.

Jan. 31. Brief filed by General Counsel.

Nov. 19. Findings of fact and opinion rendered, Sumner L. Trussell, Division 6.

Judgment will be rendered pursuant to Rule 50.

Nov. 22. Notice of settlement filed by taxpayer. 11/25/29 copy served on General Counsel.

Nov. 23. Hearing set Dec. 11, 1929 on settlement.

Dec. 11. Hearing had before Mr. Arundel on settlement under Rule 50.

Assigned to Mr. Trussell for order.

Dec. 16. Order of redetermination entered—Sumner L. Trussell, Division 6.

1930.

Jan. 28. Motion to reopen case filed by General Counsel.

Jan. 30. Hearing set Feb. 19, 1930 on motion.

1930.

Feb. 6. Order that hearing on motion be had Feb. 11, 1930 entered.
Feb. 11. Hearing had before Mr. Trussell on motion for reconsideration and amendment of findings of fact. C. A. V.
Mar. 8. Transcript of hearing of Feb. 11, 1930 filed.
May 24. Joint motion for recission of final order filed. 5/24/30 granted.
June 11. Stipulation for additional finding of fact filed.
June 19. Order denying motion for reconsideration and reinstating final determination entered.
Sept. 29. Petition for review by U. S. Circuit Court of Appeals (1) with assignments of error filed by General Counsel.
Oct. 1. Proof of service filed.
Oct. 9. Proof of service filed (taxpayer).
Oct. 9. Præcipe filed by General Counsel.
Oct. 16. Proof of service filed.

[fol. 4]

Oct. 16. Præcipe filed by taxpayer.
Oct. 20. Proof of service filed.

Now, November 18, 1930, the foregoing Docket Entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

PETITION—Filed July 23, 1926

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:RR-60D-RWH) dated May 29, 1926, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and its principal office is at South Station, Boston, Mass.

2. The notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioner on May 29, 1926.

3. The taxes in controversy are income taxes for the calendar year 1921 in the amount of one hundred and seventy-three thousand two hundred ninety-seven and seventeen one-hundredths dollars ($173,297.17). The Commissioner asserts a deficiency of seventeen thousand one hundred seventy-two and seventy-five one-hundredths dollars ($17,172.75), while the petitioner asserts that it or its lessee, The New York, New Haven and Hartford Railroad Company (hereinafter called the New Haven), is entitled to a refund of the entire amount of income taxes which have heretofore been paid with respect to the petitioner's net income for the year 1921, the petitioner and the New Haven having been affiliated during said year and the said New Haven having had a deficit in net income large enough completely to absorb the net income of the petitioner, [fol. 5] computed as for a non-affiliated company, and all other companies properly includible in the consolidated return of said New Haven.

The petitioner further asserts that even if it were not affiliated with the New Haven during 1921, it nevertheless would be and is entitled to a refund for said year in the sum of $68,763.62.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

a. The Commissioner erroneously ruled that the petitioner was not affiliated during the calendar year 1921 with the said New Haven, and erroneously computed the petitioner's tax as a separate, individual and non-affiliated company.

b. The Commissioner erred in ruling that the total or gross rental received by the petitioner in 1921 was two million, one hundred nine thousand, two hundred fifty-seven and thirty-one one-hundredths dollars ($2,109,257.31), consisting, as alleged by the Commissioner, of dividends on petitioner's stock of $1,560,580, interest on funded debt $538,920, compensation of officers $3,900, and ordinary and necessary expenses of $5,857.31. The Commissioner further erred in ruling that the petitioner's net income from rent

of road was $1,560,580. The petitioner asserts that the gross rental received from the New Haven or otherwise was $1,422,333.31, made up of $875,656, dividends on petitioner's stock and the other three items as asserted by the Commissioner; and the petitioner further asserts that its net income from rent of road was $873,608, and not $1,560,580 as asserted by the Commissioner. The petitioner further asserts that its gross income from all sources in 1921 was $1,422,381.31, consisting of the aforesaid gross income from rent of road and the sum of $48, dividends on eight (8) shares of the capital stock of the Providence, Warren and Bristol Railroad Company (hereinafter called the Bristol), owned by the petitioner in 1921. The petitioner further asserts that its net income for 1921 was $873,656, and its taxable net income was the said sum of $873,656 minus the said dividends of $48.

[fol. 6] c. The Commissioner erred in adding to the taxable income for 1921 an amount of $6,960.64, representing an apportionment of premiums on bonds between 1895 and 1904.

d. The Commissioner erred in adding to the taxable income for 1921 an amount of $7,223.93, representing an alleged gain on the sale of certain parcels of real estate over and above the gain of $644.20 erroneously reported by the petitioner on its original return.

e. The Commissioner erred in adding to the taxable income for 1921 an amount of $157,542.88, said sum being equivalent to the federal income taxes accrued against the petitioner for said year and paid and/or alleged to be payable by the petitioner's lessee.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

a. (1) That the Old Colony Railroad Company is a corporation existing under and by virtue of the laws of Massachusetts, having been incorporated March 27, 1872, by chapter 143 of the Massachusetts Acts and Resolves of that year. By said act the Old Colony and Newport Railway Company and the Cape Cod Railroad Company were authorized to unite and form one corporation. The act further authorized the Old Colony and Newport Railway Com-

pany, after the union, to change its name to Old Colony Railroad Company. Said act was accepted by the stockholders of each company on April 12, 1872. By said act of 1872 and the several acts supplementary thereto and amendatory thereof, the Old Colony Railroad Company was authorized to acquire, construct and operate a railroad.

(2) That in pursuance of the authority granted to it by said acts, the Old Colony Railroad Company acquired, constructed and operated various railroad lines and properties and was in possession of and operated the same on February 28, 1893.

(3) That on and prior to February 15, 1893, The New York, New Haven and Hartford Railroad Company was a railroad corporation, organized and existing under the laws [fol. 7] of Connecticut and Massachusetts, and operated a railroad in the States of Connecticut and Massachusetts.

(4) That on or about February 15, 1893, the Old Colony Railroad Company and The New York, New Haven and Hartford Railroad Company, deeming it to their mutual interest that their respective lines be merged into and operated as a single railroad system or unit, the Old Colony Railroad Company leased its lines and property to The New York, New Haven and Hartford Railroad Company by a lease dated February 15, 1893, copy of which lease is attached hereto and made a part hereof as "Exhibit B".

(5) That the said lease was executed in pursuance of the authorization of the stockholders of the said Old Colony Railroad Company granted February 28, 1893, and of the authorization of the stockholders of The New York, New Haven and Hartford Railroad Company, granted April 4, 1893.

(6) That said lease was approved and confirmed by an act of the Rhode Island Legislature, passed April 25, 1893, January Session, 1893 Laws, page 380, and by the Legislature of the State of Connecticut by an act of June 14, 1889, Special Laws, Volume 10, page 1298, as amended by an act of March 2, 1893, Special Laws, Volume 11, page 32, which amended the charter of The New York, New Haven and Hartford Railroad Company so that it could exchange its stock for stock of any company wholly or partly in an

adjoining state whose property it might hold by lease. This lease was also made under the General Railroad Law of Massachusetts, Public Statutes, Chapter 112, Sections 220 and 221, and in an opinion of H. M. Knowlton, Attorney General, given March 16, 1894, was declared legal under that statute.

(7) That subsequent to March 1, 1893, and during the year 1921, by virtue of the aforementioned lease, the Old Colony Railroad Company was operated as an integral part of The New York, New Haven and Hartford Railroad Company's railroad system.

(8) That during the year 1921 The New York, New [fol. 8] Haven and Hartford Railroad owned 98,132 shares of the outstanding 222,940 shares of common stock of the Old Colony Railroad Company, being 44 percent of said outstanding common stock of the Old Colony Railroad Company, that each share of said common stock was entitled to one vote, and that there was no other class of stock outstanding.

b. (1) The aforesaid lease of February 15, 1893 (Exhibit B), provided, in part, that the lessee would "pay as rent hereunder * * * sums equal to dividends at the rate of seven percent per annum, payable quarterly, upon said capital stock outstanding".

(2) Said lease also provided, "Nothing herein contained shall prevent the lessor and lessee from modifying, changing, amending, annulling or cancelling this lease by mutual agreement."

(3) During the year 1921 the petitioner had outstanding 222,940 shares of capital stock of which the New Haven owned 98,132 shares. The actual sum received by the petitioner from the New Haven as rent in 1921 was $873,656, it being previously understood and agreed by and between the petitioner and the New Haven that, in accordance with the lease, the provisions thereof as originally made were modified so as to relieve the New Haven of obligation to pay as rent any sum whatever with reference to the share of the petitioner's capital stock owned by the New Haven.

(4) By virtue of the first paragraph of said lease of February 15, 1893, the petitioner demised and let for said term

"all and singular its railroads and property of every description * * * together with the right to demand and receive for the lessee's own use all tolls, rents, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any stock and securities of other corporations owned by it, or held by or for it, all dividends thereon, and the right of voting on the same. * * *" The said lease also provided that "the lessee covenants that it * * * will also return or deliver, [fol. 9] in lieu of the personal property set out in the inventory hereinafter provided to be made, the same or other personal property of similar character, value and uses, and appropriate for the operation of the lessor's railroads", and further provided, "and the parties hereto mutually agree that an inventory and appraisal of all the personal property, including stocks and securities held by the lessor, shall be made as of the first day of March, 1893. * * *"

(5) On the first day of March, 1893, the petitioner was the owner of eight (8) shares of the capital stock of the Bristol, and the certificate therefor was duly delivered by the petitioner to the New Haven.

(6) During the year 1921 the said certificate was still held by the New Haven as lessee, and a dividend of $6 per share was declared and paid thereon in said year.

(7) The sum of $48 was paid to and received by the New Haven.

c. (1) The petitioner, since its lease to the New Haven in 1893 through and including the year 1921, was an inactive and non-operating company.

(2) Bonds were issued by the petitioner between the years 1895 and 1904, the petitioner receiving therewith premiums on bonds during said period amounting to $199,528.08.

(3) The premiums so received have been considered by both the petitioner and the New Haven as part of the surplus of the petitioner and as a closed transaction.

(4) The taxpayer at the direction of the Interstate Commerce Commission in 1914 transferred from the "Premium on Bonds Account" (into which the premium had been

placed when the bonds were sold) into "Capital Profit and Loss Account" the amount of $113,274.36, representing the amount of premiums amortized up to June, 1914, as determined by the said Commission.

(5) Since June, 1914, there has been transferred from the "Premium on Bonds Account" to "Profit and Loss Account" (surplus) on the taxpayer's books, but to income [fol. 10] for federal tax purposes, as prescribed by the Bureau of Internal Revenue, an amount of $3,960.64, representing the yearly apportionment of premiums on bonds as determined by the Commissioner.

(6) The aforesaid treatment of the premiums on bonds received by the taxpayer prior to 1909 has been solely according to the instructions of the Interstate Commerce Commission and the Commissioner of Internal Revenue and not according to the petitioner's interpretation of what the premiums on bonds so acquired represented, namely, a part of its surplus and a closed transaction prior to the year 1909.

d. (1) The aforesaid lease of February 15, 1893, provides, in part, as follows:

"And the lessor hereby makes, constitutes and appoints the lessee its true and sufficient and lawful attorney from time to time, to bargain and sell, with the assent of the directors of the lessor, lands and structures of the lessor on such terms as to the lessee shall seem meet, and hereby authorizes the lessee in the name of the lessor to make, execute, acknowledge and deliver good and sufficient deeds and conveyances of all the right, title and interest of the lessor so bargained and sold in and to the same; the lessor agreeing, whenever thereto requested by the lessee, and upon reasonable notice, to affix its corporate seal to such deeds and conveyances; and the lessee covenants and agrees that other lands and structures of equal value shall be conveyed to the lessor in lieu of any lands or structures so sold and conveyed, * * *"

(2) Several parcels of real estate of the petitioner were sold during the year 1921 and the petitioner on its original return showed a profit thereon of $664.20, which profit the Commissioner has increased to the sum of $7,888.13.

(3) The proceeds of said sales, viz, $63,982.45, were retained by the New Haven in accordance with the terms of the aforesaid lease, the said New Haven being obligated to [fol. 11] convey to the petitioner "other lands and structures of equal value * * * in lieu of (the) lands or structures so sold or conveyed".

6. The petitioner prays for relief from the deficiency asserted by the respondent on the following and each of the following particulars:

a. That the Board find that the petitioner was affiliated with the New Haven during the calendar year 1921, and entitled to a refund of all taxes for said year heretofore paid.

b. That the Board find that the taxpayer did not realize any taxable income in 1921 by reason of the payment in 1922 of the petitioner's federal income taxes by the New Haven.

c. That the Board find that the petitioner did not realize any taxable income in 1921 by reason of the apportionment of premium on bonds sold between the years 1895 and 1904.

d. That the Board find that the petitioner did not realize any taxable income in 1921 by reason of the sale by the New Haven of land or structures of the petitioner.

e. That the Board find that the gross income of the taxpayer was as follows:

(1) Rent	$873,656.00
(2) Interest	538,920.00
(3) Salaries of officers, etc.	9,757.31
(4) Dividends on Bristol stock	48.00
Total gross income	$1,422,381.31

f. That the Board find the petitioner was entitled to the following deductions:

(1) Interest on indebtedness	$538,920.00
(2) Salaries of officers, etc.	9,757.31
(3) Payment to lessee in diminution of net rental for road	48.00
Total deductions	$548,725.31

[fol. 12] g. That the Board find that the petitioner's net income was $873,656 and that its taxable net income was $873,608.

h. That the Board grant such further and other relief as to it may appear just and equitable.

Wherefore, petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

Joseph D. Brady, Counsel for Petitioner, 229 Railroad Office Building, New Haven, Connecticut.

Duly sworn to by Fayette S. Curtis. Jurat omitted in printing.

EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:RR-60D RWH

May 29, 1926.

Old Colony Railroad Company, South Station, Boston, Massachusetts.

SIRS: A reexamination of your income tax return for the year 1921 together with the information heretofore submitted discloses a tax deficiency of $17,172.75 for the year [fol. 13] in question as shown in the attached statement and accompanying schedules.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a

petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:RR-60D-RWH. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Enclosures: Statement. Form 882. Waiver—Form A. Schedules 1 and 2.

[fol. 14] Statement of Returns Examined and Resulting Tax Liability

IT:CR:RR-60D RWH

Company	Year	Form
Old Colony Railroad Company Boston Massachusetts	1921	1120

Tax Liability

Company	Year	Deficiency
Old Colony Railroad Company	1921	$17,172.75

Full details of the adjustments producing the above stated results are contained in the attached schedules 1 and 2.

In the determination of the above-mentioned tax liability due consideration has been given to the statements set forth in your claim for refund of $156,124.42 corporation income tax for the year 1921 and the findings of the Bureau with respect thereto were embodied in office letter dated December 11, 1925.

Careful consideration has been given the facts and data contained in your briefs dated February 5 and March 9, 1926 and a letter dated March 10, 1926.

Dividends on Stock of the Providence, Warren and Bristol Railroad Company.

The information submitted in your letter of March 10, 1926 has been given careful consideration with respect to your contentions anent the dividends on stock of the above-named company; however your contentions are considered untenable for the following reasons:

Under the provisions of your lease with the lessee you have leased all your property of every kind except your corporate seal and books. The lessee is entitled to all income from the leased property whether operating or non-operating revenues. The dividends in question are income to the lessee, just as much as the operating revenues that it receives. The lessor in receiving the dividends is acting only as an agent for the lessee; therefore it is held that the [fol. 15] aforementioned dividends received by the lessor and which belong to the lessee under the terms of the lease do not constitute income taxable or non-taxable to the lessor, and may not be considered as diminishing the rent payable. It is further held that the decisions at the United States Board of Tax Appeals in the matter of the Appeals of Anthony Schneider and Richard M. C. Glenn, Dockets # 4519 and # 4520 respectively are not applicable in the instant case.

A waiver which will expire December 31, 1926 is on file for the year 1921.

A carbon copy of this letter has been mailed to Mr. Elmont B. Hazard, care of Messrs. Holmes and Brewster, 815 Fifteenth Street, N. W. Washington, D. C. Messrs. Holmes, Lynn, Paul and Havens, 15 William Street, New York, N. Y. and Mr. Joseph D. Brady, Assistant Commerce Counsel, The New York, New Haven and Hartford Railroad Company, New Haven, Connecticut, in accordance with specific instructions in power of attorney running to the aforesaid and on file in this office.

Old Colony Railroad Company. Year Ended December 31, 1921

Schedule 1

Net Income

Net income as disclosed by Bureau Letter dated December 11, 1925		$1,812,143.22
As corrected		1,732,971.65
Deductions		$79,171.57
Deductions:		
(a) Income from lease of road	$5,000.00	
(b) Donations	33,142.83	
(c) Profit on sale of lands	33,831.33	
(d) Federal income tax payable by the lessee	7,197.41	
Total deductions		$79,171.57

[fol. 16] Schedule 1-a

Reasons for Changes

(a) The amount of $5,000.00 purporting to be income from lease of road, which was added to your taxable income in Bureau letter dated December 11, 1925, is hereby reversed, for the reason that it was shown in conference held March 3, 1926, that this amount represented payments made into a sinking fund, which has been held to be the property of the lessee of your railroad and is not income to you.

(b) It is held that the amount of $33,142.83, representing cost of various sidetracks in your gross income in Bureau letter of December 11, 1925 as "Donations" (constructed and paid for by others) do not come into your possession until the expiration of your lease with the New York, New Haven and Hartford Railroad Company, seventy-one years hence: therefore the only profit that would be realized by you as lessor would be the present worth of $33,142.83, discounted at six per cent for seventy-one years which amount is negligible and the adjustment made in the aforemen-

tioned letter in schedule 1, Item (c), is reversed. Reference: Mim 2714 (4 C. B. 90).

(c) The taxable profit on sale of lands is recomputed in accordance with Article 1562 of Regulations 62 and facts and data submitted in conference held on March 3, 1926 and in briefs dated February 5 and 9, 1926, as follows:

[fol. 17] Old Colony Railroad Company. Year Ended December 31, 1921

Kind of property	Date acquired	Cost	March 1, 1913, value	Proceeds	Net profit
Land, Walpole, Mass..	1891	$34.98	$29.30	$50.00	$15.02
Land, Kingston, Mass.	1879	364.14	220.00	300.00	.....
Land, Mansfield, Mass.	1889	2,416.44	4,950.00	3,200.00	.....
Land, Wrentham, Mass.	1889	258.00	3,190.00	4,000.00	810.00
Land, Quincy, Mass..	1911	15.84	26.40	50.00	23.60
Land, Wareham, Mass.	1890	52.18	240.00	260.00	20.00
Land, Boston, Mass...	1845	5,039.40	7,815.00	10,000.00	2,185.00
Land, Boston, Mass...	1874	3,219.00	3,390.00	5,085.30	1,695.30
Land, Boston, Mass...	1845	8,990.00	36,735.79	40,000.00	3,264.21
House, Wareham, Mass.	1877	2,000.00	300.00	175.00	125.00 D
Land, Roxbury, Mass..	1895	922.08	707.25	862.15	.....
		$24,212.06	$57,603.74	$63,982.45	$7,885.13
Amount included in gross income in Bureau letter dated December 11, 1925					41,719.46
Net decrease as above					$33,831.33

D—Denotes loss.

(d) Federal income and profits taxes assumed by the lessee for the lessor is held to be taxable income from rental to the lessor in accordance with article 547 of Regulations 62 and until the Commissioner of Internal Revenue is convinced through the judicial expressions of the courts or otherwise, that this decision is erroneous the Unit will require the inclusion of such items in the taxable income of lessor companies; furthermore, this item is not a deductible expense within the meaning of Article 131 of Regulations 62; therefore, the adjustment shown below is made with respect to corporation income and profits taxes payable by the lessee of your road:

Federal income taxes adjusted in Bureau letter dated December 11, 1925	$164,740.29
Accrued Federal income taxes	157,542.88
Net decrease as above	$7,197.41

[fol. 18] Old Colony Railroad Company. Year ended December 31, 1921

Schedule 2

Computation of Tax, 1921 Rates

Income Tax

Net income taxable year taxable at 10%	$1,732,971.65	$173,297.17
Previously assessed		156,124.42
		$17,172.75

Since the excess profits credit is in excess of the taxable income there is no excess profits tax liability.

Exhibit B to Petition

The Old Colony Railroad Company (hereinafter called the lessor), hereby demises and lets, for the term of ninety-nine years beginning the first day of March, 1893, unto The New York, New Haven and Hartford Railroad Company (hereinafter called the lessee), and to its successors and assigns, both the lessor and lessee being corporations existing under the laws of the Commonwealth of Massachusetts and whose roads connect with each other, all and singular its railroads and property of every description, whether within its location or not, including all rights, franchises, easements, privileges and appurtenances thereunto belonging, together with the right to demand and receive for the lessee's own use all tolls, rents, revenues, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any and all railroads operated by it, under lease or otherwise, and in or to any stock and securities of other corporations owned by it, or held by, or for it, all dividends thereon, and the right of voting on the same, and in and to all contracts and obligations of or with other railroads, corporations or individuals, and all income advantages and benefits to be [fol. 19] derived therefrom, hereby assigning and transferring unto the lessee, under the terms and provisions of this

lease, and for the purposes thereof, and subject to all obligations and incumbrances thereon, all its railroad, property, franchises and assets of every description, however described and wherever situated, except the corporate seal, the stockholders' and directors' record books, and the transfer and stock books, to which the lessee may have access at reasonable times.

And the lessor covenants with the lessee that it will suffer and permit the lessee, it keeping all the covenants on its part as herein contained, to occupy, possess and enjoy said premises, property, rights, franchises and privileges during the term aforesaid without hindrance or molestation.

And the lessor hereby makes, constitutes and appoints the lessee its agent during the term of this lease to operate all its leased railroads and property, the lessee herein to do and perform as such agent all acts with reference thereto incumbent by law or by contract upon the lessor herein and in consideration thereof to receive the income and profit arising from such operations; and the lessor hereby agrees, as soon as it legally may, to make from time to time proper and complete assignments to the lessee of all leasehold rights of the lessor.

And the lessor covenants that during the continuance of this lease it will maintain its corporate organization, the lessee paying all reasonable and proper expenses thereof, and, for that purpose will hold all necessary meetings, elect all necessary officers and make all necessary records, reports, reissues of stock certificates, and transfers and registrations of bonds; and that it will, from time to time, whenever requested by the lessee, take real estate for the convenient operation of said railroads, the lessee, however, advancing therefor all damages and expenses; and that the lessee may use the lessor's name in bringing or defending any suits or proceedings so far as it is or may be necessary for the protection or enjoyment of said demised [fol. 20] premises, property, rights, franchises and privileges, or for the acquisition of additional real estate, but at the sole expense of the lessee, saving the lessor harmless from all loss, costs or damagse thereby accruing.

And the lessor covenants that, for the purpose of making permanent improvements upon the property hereby demised and for the purpose of discharging its indebtedness, it will at the request of the lessee make such lawful issue, and reissue in renewal, of bonds or of stock, or both, as shall from time to time be necessary and proper to be issued; and that at the request of the lessee it will execute mortgages of said demised premises or any part thereof to secure the payment of the principal and interest of such bonds; and that it will not issue any stock or bonds, or create any indebtedness or lien upon said demised premises, or property, except under and in accordance with the directions, or by the previous written consent, of the lessee.

And the lessor hereby makes, constitutes and appoints the lessee its true and sufficient and lawful attorney from time to time, to bargain and sell, with the assent of the directors of the lessor, lands and structures of the lessor on such terms as to the lessee shall seem meet, and hereby authorizes the lessee in the name of the lessor to make, execute, acknowledge and deliver good and sufficient deeds and conveyances of all the right, title and interest of the lessor so bargained and sold in and to the same; the lessor agreeing, whenever thereto requested by the lessee, and upon reasonable notice, to affix its corporate seal to such deeds and conveyances; and the lessee covenants and agrees that other lands and structures of equal value shall be conveyed to the lessor in lieu of any lands or structures so sold and conveyed, and that if the lessee shall under any power herein conferred sell or abandon the lands and structures now constituting the terminals leased to the lessor in the city of Providence, the lessee shall acquire, construct and convey to the lessor of the lessor herein new terminals of equal value and sufficient for its business, and [fol. 21] to be such as will conform to the agreements of the lease of the Boston and Providence Railroad Corporation to the lessor: all property so acquired to become a part of the demised premises.

And the lessor covenants that it will at any time or times hereafter upon the reasonable request of the lessee, make, do, and execute, or cause, or procure to be made, done and executed all and every such further and other lawful and reasonable acts, conveyances, transfers, assignments and assurances in the law, for the better and more effec-

tually vesting and confirming the premises and property hereby leased, or intended so to be, in and to the lessee, as by the lessee shall be reasonably devised, advised or required.

And the lessee covenants to pay as rent hereunder on the 30th day of June, 1893, a sum equal to a dividend of two dollars and thirty-three and one-third cents upon each share of the capital stock of the lessor then outstanding; and thereafter, except as hereinafter provided, sums equal to dividends at the rate of seven per cent per annum, payable quarterly, upon said capital stock then from time to time outstanding.

And the lessee further covenants that as soon as it lawfully may, it will prior to January first, 1900, issue in the proportion of nine shares of its capital stock in exchange for ten shares of the capital stock of the lessor, then outstanding, and will give notice thereof by mail to each stockholder of the lessor and thereafter, and until six months after said exchange shall be offered to the stockholders of the lessor, upon the assignment to the lessee of ten shares of the capital stock of the lessor or any multiple thereof, and the surrender of the certificate or certificates therefor, the lessee will, whenever its stock transfer books are open, issue to the owner of said shares in exchange therefor, a certificate for the proportionate number as above provided, of shares of the capital stock of the lessee.

And the lessee covenants that in case it shall be unable to perform the covenants contained in the preceding para- [fol. 22] graph prior to the first day of July, 1893, it will thereafter, and between said first day of July, and six months after the date when it shall be able to perform said covenants, pay (in lieu of said sums equal to dividends at the rate of seven per cent per annum) a sum on each share of the outstanding capital stock from time to time of the lessor equal to nine tenths of such dividends as the lessee shall pay upon each share of its own capital stock and will secure to the stockholders of the lessor the same proportion of such pecuniary privileges as the lessee shall give upon each share of its own capital stock.

And the lessee further covenants to provide for the payment in the manner hereinbefore mentioned, of the principal of all funded indebtedness for the payment of which

the lessor may be legally holden as the same shall from time to time mature, and to assume and pay all the other obligations of the lessor of every name and nature as the same shall from time to time fall due, and to keep and perform all and singular the contracts relating to said demised premises and property now in force and binding on the lessor, whether arising under leases or otherwise, and as to property leased to the lessor, the lessee shall be subject to the leases under which such property is held.

And the lessee further covenants to pay, during each year of said terms, all taxes, rates, charges and assessments, ordinary and extraordinary, which may be lawfully imposed or assessed in any way upon the lessor or lessee with reference to the premises and property hereby demised, the capital stock of the lessor, its indebtedness, franchises and revenues or said rental; said payments to be made to the authority or treasurer entitled by law to receive the same, whether Federal, State or municipal, so that said lessor shall be saved harmless, during the continuance of this lease from any tax, assessment or charge under laws or proceedings made or authorized by the United States or any State or municipality.

Provided, that (1) if the lessee shall at any time fail to pay the interest on the lessor's bonded indebtedness when [fol. 23] the same falls due, or (2) if the lessee shall fail for thirty days to make any quarterly payment of rent as above stipulated, or (3) if the lessee shall fail to keep or perform any other of its covenants or agreements in this lease contained, and such default shall continue for six months after written notice thereof shall have been given by the lessor to the lessee; then, and in either of said events, this lease shall expire and terminate, at the option of the lessor, and the lessor may thereupon re-enter upon the demised premises, and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant.

And the lessee covenants that it will at its own cost and expense during the continuance of this lease, furnish and provide all such books, forms and papers, and do and perform all such acts and things as may be required for the proper distribution of dividends, payment of interest and for the issue, record and transfer of the stock of the lessor,

and for the issue, registration and transfer of any bonds herein referred to, as a part of the expenses of organization.

And the lessee covenants that it will operate the lessor's said railroads and the leased railroads of the lessor as required by all legal enactments from time to time in force, and furnish all equipment, in addition to that hereby demised, which may be necessary for such operation, and maintain said demised premises and property during said term in good condition and up to its present standard as a railroad; and that it will make all additions, alterations, improvements and betterments which may be necessary or proper with reference to the premises and property hereby leased; and that all lands, structures, improvements, betterments and renewals so added to or made upon the real estate hereby demised shall become the property of the lessor, and a part of the demised premises; and that at the expiration of this lease, whether by lapse of time or otherwise, it will deliver to the lessor possession of said demised [fol. 24] premises, and leased properties, rights, franchises and privileges, together with any and all additions and substitutions which may have been made thereto as aforesaid, and will also return or deliver, in lieu of the personal property set out in the inventory hereinafter provided to be made, the same or other personal property of similar character, value and uses, and appropriate for the operation of the lessor's railroads.

And the lessee covenants that it will save the lessor harmless from all suits, costs, damages and expenses by reason of any act or omission of the lessee in the use of said demised premises, under this lease; and will, at its own expense, defend all suits pending or brought against the lessor and pay the judgments therein when demanded on final process; and that it will during said term make all returns required by any laws of the State, or of the United States, in relation to the property hereby leased, to any public officer, or other legal authority; and that, should any returns be required by law of the lessor the lessee will furnish, on demand, so far as it has the means, all information necessary therefor.

And the parties hereto mutually agree that an inventory and appraisal of all the personal property hereby demised,

including stocks and securities held by the lessor, shall be made as of the first day of March, 1893, by representatives of the lessor and lessee, or in case of disagreement as to any item or items by a third person to be agreed upon by the lessor and lessee.

Nothing herein contained shall prevent the lessor and lessee from modifying, changing, amending, annulling or cancelling this lease by mutual agreement.

It is understood that this lease is made subject to approval by the stockholders of said parties respectively as required by law.

In Witness Whereof, the parties hereto, under the authority and direction of their respective Boards of Directors have caused this instrument to be signed by their respective [fol. 25] Presidents and their corporate seals to be hereto affixed, this fifteenth day of February, A. D. 1893.

Old Colony Railroad Company, by Charles F. Choate, President. (Seal.) The New York, New Haven and Hartford Railroad Company, by Charles P. Clark, President. (Seal.)

Witness-: E. G. Parker, J. G. Parker.

(Acknowledgment)

Now, November 18, 1930, the foregoing Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

ANSWER—Filed September 21, 1926

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits the allegations contained in paragraph 2 of the petition.

(3) Admits that the Commissioner asserted a deficiency of $17,172.75 and admits that more than that amount is now in controversy; but denies that the sum of $173,297.17 represents the taxes in controversy. Denies the remaining allegations contained in paragraph 3 of the petition.

(4) Denies that he committed any of the errors alleged in paragraph 4 of the petition.

(5) a. (1) Admits the allegations contained in sub-paragraph a (1) of paragraph 5.

[fol. 26] (2) Admits the allegations contained in sub-paragraph a (2) of paragraph 5.

(3) Admits the allegations contained in sub-paragraph a (3) of paragraph 5.

(4) Admits that the Old Colony Railroad Company leased its lines and property to the New York, New Haven and Hartford Railroad Company, but for want of information denies that the copy attached to the petition as "Exhibit B" is a true copy of such lease and denies the remaining allegations contained in subparagraph a (4) of paragraph 5.

(5) Admit the allegations contained in subparagraph a (5) of paragraph 5.

(6) Admits the allegations contained in subparagraph a (6) of paragraph 5.

(7) Denies the allegations contained in subparagraph a (7) of paragraph 5.

(8) Denies the allegations contained in subparagraph a (8) of paragraph 5.

(b) For want of knowledge of the terms of the lease referred to in subparagraph b (1) to b (4), inclusive, neither admits nor denies the allegations contained in the said subparagraphs and calls for proof of the same. Denies the remaining allegations contained in subparagraph b.

(c) (1) Admits the allegations contained in subparagraph c (1) of paragraph 5.

(2) Admits the allegations contained in subparagraph c (2) of paragraph 5.

(3) Denies the allegations contained in subparagraph c (3) of paragraph 5.

(4) Admits that under the rules of the Interstate Commerce Commission premiums on bonds should be amortised over the period of the life of the bonds, but for want of information denies that it was necessary for the taxpayer to make the changes alleged in subparagraph c (4) of paragraph 5 in order to comply with the aforesaid rule of the Interstate Commerce Commission.

[fol. 27] c (5) Admits that an amount of $6,960.64 is the yearly apportionment of premiums on bonds as determined by the Commissioner, who treated the same as income for Federal tax purposes, but denies the remaining allegations contained in subparagraph c (5).

c (6) Denies the allegations contained in subparagraph c (6) of paragraph 5.

d (1) For want of information, neither affirms than denies the allegations contained in paragraph d (1) of paragraph 5 and calls for proof of the same.

(2) Admits the allegations contained in subparagraph d (2) of paragraph 5.

(3) Denies the allegations contained in subparagraph d (3) of paragraph 5.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of counsel: M. N. Fisher, Special Attorney, Bureau of Internal Revenue.

Now, November 18, 1930, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

MOTION FOR PERMISSION TO FILE AMENDED PETITION—Filed at hearing and granted July 25, 1928

Comes now the petitioner, by its attorneys, James S. Y. Ivins and Joseph D. Brady, and prays that it be permitted to file an amended petition in the above-entitled case.

In support of its motion, petitioner represents that two [fol. 28] of the issues raised in the original petition are eliminated from the amended petition, and the special attorney, representing the respondent, desires to file an amended answer and has indicated that he has no objection to the filing of an amended petition.

James S. Y. Ivins, Joseph D. Brady, Attorneys for Petitioner,

% Holmes, Brewster & Ivins, 815 Fifteenth Street, N. W., Washington, D. C.

Now, November 18, 1930, the foregoing Motion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

AMENDED PETITION—Filed at hearing July 25, 1928

The above-named petitioner hereby presents its amended petition (its original petition having been filed July 23, 1926) requesting a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:RR-60D-RWH) dated May 29, 1926, and as the basis of its proceedings alleges as follows:

1. That the petitioner is a Massachusetts corporation, and its principal office is at South Station, Boston, Mass.

2. The notice of deficiency (a copy of which is hereto attached, marked "Exhibit A" and made a part hereof by reference) was mailed to the petitioner on May 29, 1926. Said deficiency notice refers to Bureau 30-day letter to the petitioner, dated December 11, 1925, copy thereof being

attached hereto, marked "Exhibit B" and made a part hereof by reference.

3. The taxes in controversy are income taxes for the calendar year 1921 in the amount of $173,297.17. The Com- [fol. 29] missioner asserts a deficiency of $17,172.75; the petitioner an overpayment of $156,124.42.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in ruling that the petitioner was not affiliated during the calendar year 1921 with The New York, New Haven and Hartford Railroad Company, hereinafter referred to as the New Haven, and erroneously computed the petitioner's tax as a separate, individual and non-affiliated company.

(b) The Commissioner erred in adding to the taxable income for 1921 as reported by the petitioner the amount of $6,960.64, representing an apportionment of premiums on bonds sold between 1894 and 1905.

(c) The Commissioner erred in adding to the taxable income for 1921 as reported by the petitioner the amount of $7,223.93, representing alleged taxable gains or profits arising from the disposition, pursuant to petitioner's lease of certain parcels of real estate or interests therein, over and above the supposed gain or profit of $664.20 erroneously reported by the petitioner.

(d) The Commissioner erred in failing to eliminate from the taxable income for 1921 as reported by the petitioner the amount of $664.20, erroneously supposed by the petitioner to be taxable gain or profit arising from the disposition, pursuant to petitioner's lease, of certain parcels of real estate, or interests therein.

(e) The Commissioner erred in adding to the taxable income for 1921 as reported by the petitioner the amount of $157,542.88, on account of the federal income taxes accrued against the petitioner for said year and paid and/or alleged to be payable by the petitioner's lessee.

(f) The Commissioner erred in failing to find that petitioner had overpaid its income taxes for 1921 in the amount of $156,124.42.

[fol. 30] 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a corporation of the State of Massachusetts, and is the owner of various railroad lines and properties in that State and in the State of Rhode Island.

(b) The New Haven is a corporation of the States of Massachusetts, Rhode Island and Connecticut, and is the owner and lessee of various railroad lines in those states and in the State of New York.

(c) On or about February 15, 1893, petitioner and the New Haven, deeming it to their mutual interest that their respective lines be merged into and operated as a single railroad system or unit, petitioner leased its lines and property to the New Haven by a lease of that date, copy of which is hereto attached, marked "Exhibit C" and made a part hereof by reference.

(d) That said lease was authorized by the stockholders of both companies, and was also made in conformity with the laws of Massachusetts, Rhode Island and Connecticut.

(e) That subsequent to March 1, 1893, and during all the calendar year 1921, the said lease was in full force and effect.

(f) That during all the year 1921, by virtue of said lease, the railroads and property of the petitioner were operated as an integral part of the New Haven's railroad system.

(g) That during all the year 1921, the New Haven owned 98,132 shares of the outstanding 222,940 shares of common stock of the petitioner, being 44 per cent of said outstanding common stock, that each share of said common stock was entitled to one vote, and that there was no other class of stock outstanding.

(h) That there was but one meeting of the stockholders of the petitioner held in 1921. Said meeting was the annual meeting, and was held at Boston on March 29, 1921.

(i) That 98,604 shares, including the 98,132 shares owned by the New Haven, were voted at said meeting by F. S. Curtis.

(j) That 18,118 shares, represented by fifty proxies, were [fol. 31] voted at said meeting by T. W. Hoogs.

(k) That 21,525 shares, represented by eighty-seven proxies, were voted at said meeting by E. M. Glidden.

(l) That a total vote of 138,247 shares was cast at said meeting, and said votes were unanimous.

(m) That F. S. Curtis is a former Vice-President of the New Haven, and in addition to being President of the petitioner, for which he received in 1921 a substantial salary, said Curtis is, and was in 1921, President of the Union Freight Railroad Company, all of whose stock was in 1921 controlled by the New Haven, and Chairman of the Trustees of The Boston Terminal Company, 80 per cent of whose stock was in 1921 owned or controlled by the New Haven. For his services in the two last-mentioned capacities said Curtis received substantial salaries in 1921.

(n) T. W. Hoogs had in 1921 been in the service of the New Haven for upward of forty years and received a substantial salary from the New Haven in that year. He was not employed by petitioner.

(o) E. M. Glidden in 1921 was Treasurer of the petitioner, the Union Freight Railroad Company, and The Boston Terminal Company, and received substantial salaries for his services in those capacities.

(p) The practice with respect to voting the stock of the petitioner in 1921, as outlined above, was similar to that followed for several years before and after said taxable year.

(q) Substantially all of the stock of the petitioner was in fact owned and/or controlled by the New Haven in 1921.

(r) The New Haven in 1921 had a deficit in consolidated net income sufficient completely to absorb the income of the petitioner and that of all other companies affiliated with it in said year.

(s) The facts found by the Board of Tax Appeals with respect to bond premiums for the year 1920, Old Colony Railroad Company v. Commissioner of Internal Revenue, [fol. 32] 6 B. T. A. 1025, are incorporated herein by reference, a like situation having existed in 1921.

(t) In Schedule A-23 of its return for 1921, petitioner reported the disposition during that year of eleven parcels of real estate. It reported taxable gains or profits with respect to seven of said parcels aggregating $2,539.20, deductible losses aggregating $1,875 with respect to two of said parcels, and, on the remaining two, neither taxable profits nor deductible losses. The net gain or profit of $664.20, assumed by the petitioner to have been realized, was carried into the net income of $1,561,244.20 shown on the return.

(u) The proceeds of said transactions were received and retained by petitioner's lessee in accordance with the lease, and were never received by petitioner, the petitioner being entitled only to have the lessee convey to petitioner "other lands and structures of equal value * * * in lieu of any lands or structures so sold or conveyed".

(v) In Schedule 1-a of his 60-day letter (Exhibit A) the Commissioner increased the net taxable profit on the aforementioned eleven parcels to $7,888.13, and added to the net income of petitioner, on account of said items, the sum of $7,223.93.

(w) One of said parcels shown in said Schedule 1-a and designated therein as "Land, Boston, Mass. * * * Net Profit $3,264.21", and hereinafter referred to as "Parcel A", in fact related to an assessment in land, of an area of 14,270 square feet, owned by the petitioner, but leased to the New Haven, in the City of Boston. Said easement was taken in May, 1916, by said city for subway purposes. In March, 1917, the petitioner and the New Haven jointly petitioned the Superior Court for Suffolk County, Massachusetts, for assessment of damages. Said action embraced a claim of the petitioner with respect to the easement taken as well as for consequential damages to adjoining property not taken; also a claim by the New Haven for damages arising out of said taking. Said action was compromised and settled in March, 1921, for the sum of [fol. 33] $40,000. Said sum was received by the New Haven, which as lessee was entitled to the use of the property taken, and was never received by the petitioner.

(x) Another of said parcels shown in said Schedule 1-a and designated therein as "Land, Quincy, Mass. 1911

* * * Net Profit $23.60", and hereinafter referred to as "Parcel B", in fact related to land, of an area of 132 square feet, more or less, owned by petitioner, but leased to the New Haven, in the City of Quincy, taken in September, 1919, by said city for highway purposes under its power of eminent domain. The damages of $50 from said taking were received by the New Haven as in the case of "Parcel A".

(y) Another of said parcels shown in said Schedule 1-a and designated therein as "Land, Wareham, Mass. 1890 * * * Net Profit $20.00", and hereinafter referred to as "Parcel C", in fact related to land, of an area of 39 square rods, owned by the petitioner, but leased to the New Haven, in the City of Wareham. Said land was taken in June, 1920, for highway purposes, by the Cohasset Narrows Bridge Commission under its power of eminent domain. The damages of $260 from said taking were received by the New Haven as in the case of "Parcel A".

(z) The remaining eight parcels shown in said Schedule 1-a and not specifically mentioned above were sold by petitioner's lessee in accordance with the terms of petitioner's lease. The March 1, 1913 value of said parcels was as found by the Commissioner in Schedule 1-a of his deficiency notice.

(aa) That the federal income taxes of petitioner for 1921 have heretofore been paid in the amount of $156,124.42, no part of which has been refunded.

(bb) That petitioner's books of account were, during the taxable year 1921 and also before and after, kept on the accrual basis.

6. The petitioner prays for relief from the deficiency asserted by the respondent on the following and each of the following particulars:

[fol. 34] (a) That the Board find that the petitioner was affiliated with the New Haven during the year 1921, and has overpaid its federal income taxes for said year in the amount of $156,124.42.

(b) That the Board find that the petitioner did not realize any taxable income by reason of the apportionment of premium on bonds sold between 1894 and 1905.

(c) That the Board find that the petitioner derived no taxable gain or profit from the disposition, pursuant to and in accordance with the terms of its lease, of parcels of real estate.

(d) In the event the Board should find that any of said real estate dispositions resulted in taxable profits, that it also find that no taxable profits were derived in 1921 from property, or interests therein, taken under the power of eminent domain, as in the cases of "Parcel A", "Parcel B" and "Parcel C".

(e) That the Board find that petitioner derived no taxable income from the payment of its federal income taxes by its lessee.

(f) That the Board grant such further and other relief as to it may appear just and equitable.

Wherefore, petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

Joseph D. Brady, Counsel for Petitioner.

c/o Holmes, Brewster & Ivins, 815 Fifteenth Street, N. W., Washington, D. C.

Duly sworn to by Arthur W. Johnson. Jurat omitted in printing.

[fol. 35] EXHIBIT A

[MEMORANDUM.—Exhibit A, already printed at page 12, is here omitted. A: I. Charron, Clerk.]

EXHIBIT B TO AMENDED PETITION

Treasury Department

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:CR:RR RWH.

Washington, Dec. 11, 1925.

Old Colony Railroad Company, Room 225 South Station, Boston, Massachusetts.

SIRS: An examination of your income and profits tax return for the year 1921 discloses a tax deficiency of $25,-

089.90 for that year as shown in the attached statement and accompanying schedules.

You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter.

A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, [fol. 36] the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the United States Board of Tax Appeals in the event you do not acquiesce in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the inclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:RR-RWH. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully, C. R. Nash, Assistant to the Commissioner.

Inclosures: Statements. Agreement—Form A. Schedules 1 and 2.

Form 7860, Aug., 1924.

[fol. 37] IT:CR:RR RWH

Statement of Returns Examined and Resulting Tax Liability

Returns Examined

Company	Year	Form
Old Colony Railroad Company, Boston, Massachusetts	1921	1120

Tax Liability

Company	Year	Additional tax
Old Colony Railroad Company	1921	$25,089.90

Full details of the adjustments producing the above-stated results are contained in the attached Schedules 1 to 2, inclusive.

In the determination of the above corrected tax liability due consideration has been given to the statements set forth in your claim for refund of $156,124.42 corporation income tax for the year 1921.

The claim is based upon the following statements:

(a) That you filed a separate Income and Profits Return, Form 1120, for the year 1921, and paid a tax of $156,124.42 thereon, while as a matter of fact and law said company was affiliated with the New York, New Haven and Hartford Railroad Company during the year 1921. Furthermore, that an examination has been made of the 1921 consolidated return of the New York, New Haven and Hartford Railroad Company and affiliated companies, excluding The Old Colony Railroad Company, with the result that a deficit will be shown large enough completely to absorb any addition to income which would result from the inclusion of this company therein.

(b) The original return of this company included in its net income an amount of $48.00 representing dividend income. This item is not subject to the Normal tax and should be eliminated from this company's taxable net income. Said item is identical with an item of like amount

[fol. 38] referred to and allowed in Treasury Department letter of February 4, 1924.

The findings of the Bureau are as follows:

(a) The question of the affiliation of your company with the New York, New Haven and Hartford Railroad Company for the year 1918 has been made the basis of an appeal to the United States Board of Tax Appeals and in Docket No. 1024, Decision No. 408, April 28, 1925 it was held that your company and the New York, New Haven and Hartford Railroad Company were not affiliated; therefore your contention with respect thereto is hereby denied.

(b) An examination of your return for the year 1921, shows that you have included in gross income, on account of income from lease of road, the sum of $2,109,257.31 and since the lease by the Old Colony Railroad Company to the New York, New Haven and Hartford Railroad Company dated February 15, 1893 provides for an annual rental for exactly the amount shown on your return consisting of:

Dividends on Stock	$1,560,580.00
Interest on Funded Debt	538,920.00
Compensation of Officers	3,900.00
Expenses (Ordinary & Necessary)	5,857.31
	$2,109,257.31

Your contention to exclude the aforesaid amount of $48.00 dividend income is also denied.

A carbon copy of this letter has been mailed to Mr. Elmont B. Hazard, care of Messrs. Holmes and Brewster, 815 Fifteenth Street, N. W., Washington, D. C.; Messrs. Holmes, Lynn, Paul and Havens, 15 William Street, New York, N. Y. and Mr. Joseph D. Brady, Yellow Building, New Haven, Connecticut, in accordance with specific instructions in power of attorney running to the aforesaid and on file in this office.

[fol. 39] Old Colony Railroad Company. Year Ended December 31, 1921

Schedule 1

Net Income

Net income as disclosed by return		$1,561,244.20
As corrected		1,812,143.22
Additions		$250,899.02
Additions:		
(a) Income from lease of road	$5,000.00	
(b) Premium on bonds	6,960.64	
(c) Donations	33,142.83	
(d) Profit on sale of lands	41,055.26	
(e) Federal income tax payable by lessee	164,740.29	
Total additions		$250,899.02

Schedule 1-a

Explanation of Items Changed

(a) In accordance with Article 541 of Regulations 62, gross income embraces not only the operating revenues, but also gains, profits, and income from all other sources; therefore, the difference between the amount of $2,109,257.31 reported on your return as "Income from lease of road" and the amount of $2,114,257.31 shown in your annual report to the Interstate Commerce Commission as income from lease of road is included in your gross income.

(b) The amount of $6,960.64, premium on bonds sold prior to 1919 credited to your income account has been included in your gross income in accordance with Article 545 of Regulations 62.

(c) The amount of $33,142.83 representing donations credited to surplus account is added to your gross income for the reason that such payments are made to the carriers as a result of an obligation arising out of a contract be-
[fol. 40] tween the industry and the carrier, in which the carrier agrees to construct the facility and furnish the necessary service to and from the industry, in consideration of such payments by the industry. It is clear from

the above that such payments are not free and voluntary gifts, and that the agreement by the carrier to construct such facilities, and to furnish the necessary service is a valuable consideration sufficient to support the contract (Reference: ARR 3513 CB 11-2 page 83.) Furthermore, it is held in O. D. 1019 CB 5 page 151 and in ARR 1008 CB 1-2 page 120, that similar payments are deductible as a business expense by the industry making such payment.

(d) The difference between the profit on sale of capital assets of $664.20 shown on original return and the book profit of $41,719.46 credited to profit and loss, is added to your gross income for the reason that a mere statement that the March 1, 1913 value was determined by either appraisal or award is not considered sufficient evidence of the March 1, 1913 value to be acceptible by this office within the meaning of Article 1561 of Regulations 62.

(e) The Unit has consistently held that taxes assumed by the lessee for the lessor, under the provisions of a lease, constitute rental income to the lessor, *under the provisions of a lease, constitute rental income to the lessor,* and should be returned as taxable income to the lessor in accordance with Article 547 of Regulations 62, and until the Commissioner of Internal Revenue is convinced through judicial expressions of the courts, or otherwise, that the above-mentioned ruling is erroneous, the Unit will require the inclusion of such items in the taxable income of lessor companies; therefore, the amount of $164,740.29, Federal income taxes for the year 1921 payable by the lessee of your property has been included in your taxable income.

[fol. 41] Old Colony Railroad Company. Year ended December 31, 1921

Schedule 2

Computation of Tax, 1921 Rates

Income Tax

Net income taxable year taxable at 10%	$1,812,143.22
Income Tax	$181,214.32
Previously assessed	156,124.42
Additional to be assessed	$25,089.90

Inasmuch as the profits tax credit is in excess of the net income subject to such tax no profits tax has been developed.

MEMORANDUM RE EXHIBIT C

Lease by the Old Colony Railroad Company of its main lines and branch lines of railroad extending from Boston, Massachusetts, through Massachusetts and Rhode Island, (534.08 miles) to the New York, New Haven and Hartford Railroad Company for term of ninety-nine years from March 1, 1893. Dated February 15, 1893.

[MEMORANDUM.—The rest of Exhibit C is here omitted as it is identical with Exhibit B, printed at pages 18 to 25 inclusive. A. I. Charron, Clerk.]

Now, November 18, 1930, the foregoing Amended Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 42] BEFORE U. S. BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION—Filed at hearing July 25, 1928

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and, for answer to the amended petition of this taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition.

4. Denies that the Commissioner erred in his determinations as alleged in paragraph 4 of the amended petition.

5 (a) to (g), incl. Admits the material allegations contained in paragraphs 5 (a) to (q), inclusive, of the amended petition.

5 (h) to (q), incl. Denies the material allegations of fact contained in paragraph 5 (h) to (q), inclusive, of the amended petition.

5 (r.) Denies the material allegations of fact contained in paragraph 5 (r) of the amended petition.

5 (t). Admits the material allegations of fact contained in paragraph 5 (t) of the amended petition.

5 (w) to (z), incl. Admits that taxpayer included in its 1921 return certain profits arising from the sale of eleven certain parcels of land sold in that year.

Alleges that taxpayer in its return for 1922 reported a profit of $99,434.39 on the sale of a certain parcel of land referred to and known as the "Squantum" land. This profit was increased by the Commissioner to $335,500.71 in the deficiency letter covering the year 1922. This tract of land was acquired by petitioner in 1895 at a cost of $206,016.29. The said tract was taken over on October 6, 1917 by the United States Government for war purposes. A dis- [fol. 43] pute arose as to the compensation to be paid therefor which resulted in an action being brought in the Court of Claims. That court on May 31, 1921 rendered judgment against the Government and in favor of this petitioner for $575,000. See Old Colony Railroad Company v. United States, 56 Ct. Cls. 326. The Commissioner contends that the profit on this parcel of land should be excluded from 1922 income and included in 1921 income.

5 (aa). Admits the material allegations of fact contained in paragraph 5 (aa) of the amended petition. The Commissioner alleges that petitioner's net income for 1920 (exclusive of any amount paid or accrued as Federal income or profits taxes) was $1,555,394.85 and the Federal income and profits taxes paid in 1921 by the New Haven on taxpayer's net income was at least $155,339.49, no part of which has been refunded. If the Board finds that the 1921 taxes in the amount of $156,124.42 should not be included in taxpayer's 1921 income then the Commissioner alleges in the alternative that petitioner's 1920 taxes paid by the New Haven

Railroad Company in the amount of $155,339.49 should be included in taxpayer's 1921 income.

5 (bb). Admits the material allegations of fact contained in paragraph 5 (bb) of the amended petition.

Denies generally and specifically each and every other allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: A. H. Fast, Special Attorney, Bureau of Internal Revenue.

[fol. 44] Now, November 18, 1930, the foregoing Answer to Amended Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

MOTION FOR SEVERANCE OF ISSUES AND LIMITATION OF HEARING TO CERTAIN ISSUES—Filed at hearing and granted August 3, 1928

Now comes the petitioner in the above cause, by its attorneys, James S. Y. Ivins and Joseph D. Brady, and respectfully moves the Board to order a severance of the issues in the above cause and to limit the hearing set for August 3, 1928, to the following issues

(a), (b), (c), (d), (e) and (f) of the amended petition, together with the issues raised by respondent in his answer to the amended petition, exclusive of the matter of March 1, 1913, value.

This motion is submitted for the following reasons:

(a) Were it not for the additional issues raised by respondent in his answer to the amended petition, the entire case could be disposed of by the Board after one hearing;

(b) The respondent, however, in his answer to the amended petition contends that the amount of just compensation awarded by the Court of Claims of the United States in 1921 on account of the taking of certain property by the United States in 1917 for war purposes created a taxable gain to petitioner in 1921. The burden is on respondent to show the amount of gain realized by petitioner and, therefore, he must prove March 1, 1913, value. Petitioner contends that no taxable gain was realized in any year and, in the alternative, that the gain, if any, was realized prior to 1921. If the Board and/or the courts on appeal should hold that the transaction was not taxable at all, or, if taxable, was includible in a year other than 1921, there would be no occasion for the taking of testimony as to March 1, 1913, value.

[fol. 45] (c) Adequately to present evidence as to March 1, 1913, value would entail substantial expenses on the part of both the respondent and petitioner, and would take several days of the Board's time.

(d) Counsel for the respondent has indicated that the procedure above suggested meets with his entire approval.

James S. Y. Ivins, Joseph D. Brady, Counsel for Petitioner.

c/o Holmes, Brewster & Irvins, 815 Fifteenth Street, N. W., Washington, D. C.

August 3, 1928.

Now, November 18, 1930, the foregoing Motion certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 18813

OLD COLONY RAILROAD CO., Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Findings of Fact and Opinion—Promulgated November 19, 1929

Income. Leased Property. Taxes Paid by Lessee.—The amount of petitioner's Federal income and profits taxes for

1920, due and payable in 1921 and paid for its account in that year by the lessee of all of its property and business as one of the considerations for the use of the property, Held, to be income to petitioner for 1921. Providence & Worcester Railroad Co., 5 B. T. A. 1186.

Id. Bond Premiums.—Petitioner received prior to 1905 premiums on sales of certain of its bonds due and payable subsequent to the taxable year 1921. Held, that no portion of such premiums represented income to petitioner in 1921. Old Colony Railroad Co., 6 B. T. A.

[fol. 46] Id. Lessee's Transactions in Leased Properties.—Under the term of a 99-year lease of all of its property, petitioner granted to the lessee the right to dispose of items of the leased property no longer necessary, in the opinion of the lessee, to the use of the property, the lessee being obligated, in the case of such disposals, to replace such property before or at the expiration of the lease with other property of an equal value. The proceeds of such sales were received and retained by the lessee, and the latter made the replacements as provided. Held, that from such sales during the taxable year 1921 petitioner derived no income, their effect as to it being merely an unrealized appreciation in value of its reversion in the leased property as a whole.

Affiliation. All of petitioner's property and business was used and operated during the taxable year 1921 by its lessee under a 99-year lease, such lessee also being the owner of 44 percent of its capital stock and an additional 18.56 percent of such stock being owned or controlled by stockholders of the lessee. Approximately 38 percent of petitioner's voting stock was owned during that year by stockholders having no connection or community of interest with the lessee but who made no effort to contest the latter's control of petitioner's business and policies and such of them as participated in the stockholders' meeting of that year voluntarily gave their proxies to the lessee. Held, that the lessee did not own or control substantially all of petitioner's stock during the taxable year in question.

J. S. Y. Ivins, Esq., and Joseph D. Brady, Esq., for the petitioner.

Arthur H. Fast, Esq., for the respondent.

The taxes here in controversy are for the calendar year [fol. 47] 1921, the respondent having asserted a deficiency of $17,172.75 and the petitioner an overpayment of $156,124.42. The errors assigned are upon (a) respondent's refusal to treat petitioner as affiliated with the New York, New Haven & Hartford Railroad Co. during the taxable year, and (b) his inclusion in petitioner's taxable income for that year of amounts representing (1) an apportionment of premiums received between 1894 and 1905 on sales of its bonds; (2) Federal income taxes assessed against it but paid or payable by its lessee, and (3) amounts as representing taxable gains upon sales of certain of its capital assets by such lessee.

In his answer filed to the petition respondent charges petitioner with the receipt in 1921 of $335,500.71 of income in addition to that upon which the deficiency of $17,172.75 was computed, and asks on this basis that the deficiency be increased.

Findings of Fact

Petition is a corporation chartered under the laws of Massachusetts and with its principal office at South Station, Boston. The New York, New Haven & Hartford Railroad Co., hereinafter called the "New Haven", is a corporation organized and existing under the laws of Massachusetts, Rhode Island and Connecticut and operates a railroad system in those States and in the State of New York.

On February 15, 1893, petitioner leased its railroad lines and all other property to the New Haven for a term of 99 years from March 1, 1893. The provisions of this lease, which has been in full force and effect ever since that time, appear in full in our findings of fact in the matter of the appeal of this same petitioner in respect to its tax liability for the year 1918 (Old Colony Railroad Co., 1 B. T. A. 1067), to which reference is made, and for that reason need not here be set out.

During the calendar year 1921 the railroad and property of the petitioner were under the lease operated as a part of the railroad system of the New Haven. During all of that [fol. 48] taxable year petitioner had issued and outstanding 222,940 shares of capital stock, all of it common and voting stock. During all of that year the New Haven owned 98,132 shares of this stock. The 19 next largest stockholders

owned a total of 14,655 shares at the beginning of that year and 14,527 at the close, the largest of these 19 individual stockholdings being 4,200 shares and the next largest 1,084 shares. The balance of the stock, 110,153 shares, was owned by 4,819 different individuals and corporations, none of whom owned as many as 358 shares. In additional to the 98,132 shares owned by the New Haven, 41,390 shares, or 18.56 percent of the entire amount outstanding, were owned or controlled by 313 persons and corporations as individuals or trustees, who at the same time owned or controlled 61,757 shares of the 1,571,179 outstanding shares of stock of the New Haven.

There was but one meeting of petitioner's stockholders in 1921, this being the regular annual meeting on March 29. In calling this meeting the same procedure was followed as in preceding years and as called for by the by-laws, a notice being mailed to all holders of 75 or more shares of stock, the smaller stockholders being notified only by the regular advertisement of the meeting made in newspapers. With each notice mailed there was included a form of proxy with spaces for the names of both the attorney and the stockholder in blank. At this meeting 138,247 shares of petitioner's stock were represented and voted. This included the 98,132 shares owned by the New Haven and for which a proxy was given by it to F. S. Curtis and A. P. Russell. Of the balance of stock voted, 143 shares were represented by a proxy returned made out to F. S. Curtis and the rest was represented by 137 proxies signed and returned with the name of the attorney-in-fact left blank and which were formally completed by a clerk of petitioner by the insertion of the name of E. M. Glidden in some and the name of T. W. Hoogs in others. Some of these proxies were given by individuals included among the 313 stockholders of petitioner [fol. 49] who also owned stock of the New Haven and some by parties who had no interest in or connection with the New Haven. The said A. P. Russell was then and is now a vice-president of the New Haven and a director of petitioner. The said F. S. Curtis was then and is now the president of petitioner. He had for many years been an officer of the New Haven, resigning as vice-president in 1907 to become president of petitioner. He had prior to that time, and while he was vice-president of the New Haven, been a director of petitioner. Curtis for many years had been,

and was during 1921, president of the Union Freight Railroad, chairman of the trustees of the Boston Terminal Company, and director of the Providence, Warren & Bristol Railroad Co. All of the stock of the Union Freight Railroad was in 1921 owned or controlled by the New Haven, which also controlled 80 percent of the stock of the Boston Terminal Company, and was the lessee of the Providence, Warren and Bristol, Curtis being a director in the latter, nominated by the New Haven. The said E. M. Glidden was in 1921 treasurer of petitioner and also of the Union Freight Railroad Company, Boston Terminal Company, and Providence, Warren & Bristol Railroad Co. The said T. W. Hoogs was in that year an employee of the New Haven, in the office of its vice-president. The 138,247 shares of petitioner's stock voted at the 1921 annual meeting were voted by Curtis, Glidden and Hoogs, who were the only parties present at such meeting with exception of B. A. Powers, clerk of petitioner, and who is also employed by the Boston Terminal Company and Union Freight Railroad Company, and who prepared the ballots for election of officers. All of the stock was voted similarly for the officers elected. The procedure and result was typical of that in prior years. There was never any effort by the small stockholders to combine or oppose the control of the election by the New Haven. The directors' meetings of petitioner are held quarterly. The only business transacted at such meetings is the election of officers, declaration of dividends, and the [fol. 50] formal approval of requests made by the New Haven in respect to matters required of them under the terms of the lease agreement between petitioner and the New Haven.

A consolidated return of the New Haven and its affiliated companies for the year 1921 would show a net loss sufficient to completely absorb the net income of petitioner for that year.

The New Haven did not own or control substantially all of the stock of petitioner during 1921, nor was substantially all of the stock of those two companies owned or controlled by the same interests during that year.

During the years 1895 to 1904 petitioner issued and sold its bonds for divers amounts, receiving therefor, in addition to the face amount of such bonds, premiums aggregating $199,528.08. Such premiums were credited to a "Premium

on Bond" account and remained there undisturbed until 1914, when the Interstate Commerce Commission required the petitioner, for the purpose of its report to that Commission, to amortize such premiums over the periods of the respective lives of the bonds. For the purpose of meeting the requirements of the Interstate Commerce Commission, and over its protests to that Commission, the petitioner made such adjustments, and for each year subsequent to 1914 reported a ratable proportion of such premiums to the Commission as income. On its books in each such year petitioner credited such proportion of the premiums to profit and loss account (a surplus account) and not to its income account. The amount so credited to profit and loss account for 1921 was $6,960.64. The respondent increased petitioner's taxable income for the year 1921 by such amount of $6,960.64. The New Haven as lessee paid the entire amount of interest accruing on petitioner's funded debt in 1921, and the full amount thereof was included in the gross income shown on petitioner's 1921 return.

By virtue of the provisions of the lease agreement the [fol. 51] New Haven paid in 1922 the Federal income and profits taxes for the year 1921 upon the net income returned by petitioner for that year. The amounts of such taxes were $156,124.42 on income of $1,568,244.20 returned for 1921, and which did not include any amount paid or accrued as Federal income or profits taxes. No part of such payment has been refunded. The taxes so paid were not due or payable until on or after March 15, 1922. In determining the deficiency here appealed from respondent included in petitioner's income for 1921 the sum of the taxes so paid. Similarly in 1921 the New Haven paid the Federal income and profits taxes upon the income returned by petitioner for 1920, such taxes being due and payable in 1921. The taxes so paid amounted to $155,339.49 upon a net income of $1,555,394.85, and which did not include any amount paid or accrued as Federal income or profits taxes. No part of such payment has been refunded. No amount was included by respondent in the deficiency here appealed from on account of the payment of such 1920 taxes in 1921, but respondent now seeks to include the amount of such payment in petitioner's income of 1921, if it be held that the payment made in 1922 of 1921 taxes did not represent income to petitioner in the latter year.

In 1921 the New Haven, as lessee of petitioner, paid to or for the account of petitioner, exclusive of taxes, the sum of $2,109,257.31. This sum was at once disbursed by petitioner as follows:

Dividends	$1,560,580.00
Interest	538,920.00
Organization Expenses	9,757.31
	$2,109,257.31

These items were included in gross income by petitioner in making its return for 1921. Petitioner also included in income in that return an item of $664.20 as a net amount of taxable profit in that year from 11 transactions as sales of real estate. Respondent in determining the deficiency [fol. 52] increased this profit to $7,888.13. The 11 transactions reported were as follows:

Sales of Land

Property	Date acquired	Cost	Amt. received
East Walpole, Mass.	1891	$34.98	$50.00
Kingston, Mass.	1879	364.14	300.00
Mansfield, Mass.	1889	2,416.44	3,200.00
Wrentham, Mass.	1889	258.00	4,000.00
Boston, Mass.	1845	5,939.40	10,000.00
Boston, Mass.	1871-1874	3,219.00	5,085.30
Wareham, Mass.	1874	2,000.00	175.00
Roxbury, Mass.	1895	922.08	862.15

Dispositions Through Condemnation

Property	Date acquired	Cost	Amt. received
Quincy, Mass.	1911	$15.84	$50.00
Wareham, Mass.	1890	52.80	260.00
Boston, Mass.	1845	8,890.00	40,000.00

The first seven items listed above were sales made by the New Haven of land of petitioner and approved by petitioner's directors as provided in the lease. On all of these sales the amounts for which the property sold were received by the New Haven in 1921. The eighth item was a similar

sale made in 1919 and on which the consideration was received in that year. The ninth and tenth items were lands of petitioner taken under condemnation for public use and paid for in 1921. The last item listed was an easement belonging to petitioner and condemned by the City of Boston in 1916, and after considerable litigation a compromise was effected under which the city paid in 1921 the sum of $40,000. In the case of all of these dispositions listed the consideration paid was received from the grantees by and retained by the New Haven. The total gain of $664.20 reported by petitioner as taxable gain on these transactions was computed upon the basis of an estimated March 1, 1913, value in each case determined by the Real Estate Department of the New Haven.

[fol. 53] In carrying out operations between petitioner and the New Haven under the lease of the former's properties by the latter, the cost of all purchases of property by the lessee of additions to petitioner's property and the cost of all permanent improvements, which cost petitioner would be obligated upon demand of the lessee to reimburse it for by issue and sale of additional bonds or stock, was, upon such expenditures being made, charged to petitioner upon an open account maintained upon the books of each company. This open account with the New Haven upon petitioner's books is credited with the cost of such additions and permanent improvements and debited with the proceeds of any sales of petitioner's property made by the New Haven. This open account with petitioner on the New Haven's books is debited with cost of such additions and permanent improvements and credited with the proceeds of sales of petitioner's property. When a parcel of petitioner's real estate is disposed of by the New Haven, petitioner also credits its property account with an amount equal to its cost and either debits or credits its profit and loss account, as the case may be, with the difference between such cost and the amount paid the New Haven by the purchaser. Credits to the open account upon petitioner's books with the New Haven and representing additions and permanent improvements are also debited to petitioner's property account. Whenever the debit balance in the open account on the New Haven's books reaches an amount which, in the judgment of the officers of the New Haven, is sufficiently substantial, the petitioner, at the re-

quest of the New Haven, issues stocks or bonds, which are sold at their market value, and the proceeds paid over to the New Haven, which credits the amounts thereof to the open account with petitioner. No rights to subscribe of any value accrue to petitioner's stockholders or bondholders. The said open accounts do not carry interest.

On December 9, 1920, the New Haven placed a first and refunding mortgage on its property, including its leasehold [fol. 54] interest in the property of the petitioner. In many instances upon the receipt of the proceeds from the disposition of petitioner's real estate, the New Haven notified the Bankers Trust Company, trustee under said mortgage, that the proceeds either had been or would be applied to a specific-named improvement or addition on the line of petitioner. In all instances such proceeds were credited to the open account.

In 1895 petitioner acquired a tract of 731 acres at Squantum (Quincy), Mass., at a cost of $206,016.29. On October 6, 1917, the President, under authority of the Act of Congress, approved on that date, 40 Stat. 345, 371, condemned and took over for immediate use for national defense purposes the title and possession of such land and under the provisions of that act determined the amount of just compensation to be paid therefor to be $400,000. The petitioner and the New Haven were not satisfied with this amount and, as permitted by the provisions of that act, elected to receive 75 per centum of the amount of the award by the President or $300,000 and to bring suit in the Court of Claims to recover of the United States the difference between this sum and such amount as would be found by the court to be just compensation for the property taken.

On or about May 22, 1918, the United States paid to petitioner and the New Haven the $300,000 elected to be received in partial payment. On January 18, 1919, this sum of $300,000 was credited to petitioner by the New Haven upon the open account heretofore mentioned.

On February 5, 1919, petitioner and the New Haven brought suit in the Court of Claims to recover of the United States the additional amount claimed as just compensation for the Squantum property. In this suit the court found upon stipulation of the parties that the reasonable value of the property taken was $575,000, and on May

31, 1921, entered judgment for $275,000, which sum was received by the New Haven in February, 1922, and thereupon credited to petitioner by the New Haven upon the [fol. 55] aforementioned open account. Petitioner accounted for this transaction on its books in 1922 by crediting its profit and loss account with the sum of $335,590.70, said sum being the difference between $575,000 and the cost of the property plus expenses incident to the recovery of that amount. Petitioner computed a gain on this disposition of real property of $99,434.39, and reported this on its return for 1922, and respondent upon examination of that return increased such profit to $335,500.71 and now contends that such profit represents income for 1921. Petitioner has at all times kept its accounts upon an accrual basis.

OPINION

TRUSSELL:

Two of the issues raised by petitioner need little discussion as they each involve a question which has been heretofore presented to us and decided upon facts similar to those here involved. One of these issues is the so-called "tax" on "tax" question, or whether payments of Federal income taxes by the lessee for account of the lessor, as required by the terms of the lease, constitute additional income to the lessor. That such payments represent additional taxable income was held by the Supreme Court in Old Colony Trust Company et al., Executors, v. Commissioner of Internal Revenue and United States v. Boston & Maine Railroad Company, both decided June 3, 1929, and we accordingly have for determination here the question of what income of this character received by petitioner constitutes income for the calendar year 1921. Respondent in determining the deficiency has included the amount of Federal taxes in respect of income for that year and which were due and payable in 1922 and paid in that year by the New Haven, but asks, in the event that such taxes are held not to represent income for 1921, that the deficiency be redetermined by including in petitioner's income the sum of $155,339.49 income and profits taxes of petitioner for 1920, due and paid by the New Haven in 1921 for account of petitioner. We

held that the Commissioner was in error in including in [fol. 56] income for 1921 the amount of Federal taxes for that year not due or payable and not paid until 1922. Norwich & Worcester Railroad Co., 2 B. T. A. 215; United States v. Norwich & Worcester Railroad Co., 16 Fed. (2d) 944. We further hold that the $155,339.49 of Federal income and profits taxes of petitioner for the calendar year 1920 due and payable in 1921 and paid in that year by the New Haven for account of petitioner represents additional income in that amount to the latter for 1921. Providence & Worcester Railroad Co., 5 B. T. A. 1186; Old Colony Trust Company et al., Executors, 7 B. T. A. 648; Houston Belt & Terminal Railroad Co., 6 B. T. A. 1364.

The second issue is upon respondent's inclusion in petitioner's income for 1921 of a proportionate amount of the premiums received by it prior to 1905 on sales of its bonds which are not yet due and payable, respondent having prorated such premium over the life of the bonds and allocated $6,960.64 thereof to income for that year. In Old Colony Railroad Co., 6 B. T. A. 1025, this same question was presented with respect to this petitioner's tax liability for 1920 and we held that respondent's action in prorating the amount of such premiums as income of current years during the bond period was in error and this error was affirmed by the Circuit Court of Appeals, 26 Fed. (2d) 408. Under authority of that decision we held that no part of the premiums in question represented income to petitioner in 1921.

This brings us to consideration, in the light of facts here proven, of the question of whether petitioner was affiliated with the New Haven in 1921. The question is a vital one in this proceeding, as it is admitted by stipulation that the New Haven sustained a net loss in this taxable year sufficient to absorb any net income found as received by petitioner and if it be found that affiliation as defined in section 240 (c) of the Revenue Act of 1921 existed, the result would wipe out the liability not only for the deficiency determined [fol. 57] but for the tax already paid for that year. The section in question reads as follows:

(c) For the purposes of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely

affiliated interests or by a nominee or nominees substantially all the stock of the other or others or (2) is substantially all the stock of two or more corporations is owned or controlled by the same interests.

In Old Colony Railroad Co., 1 B. T. A. 1067, this same petitioner, for the year 1918, upon proof of the same facts as shown herein as to operation of its railroad and properties under this same lease and the ownership during that year by the New Haven of 98,122 shares of its stock, claimed affiliation with the New Haven and we held this proof insufficient to show "ownership or control of substantially all" of its stock by the New Haven and denied the claim of affiliation. However, the claim is here asserted as to a different year and is to be determined upon the proof adduced as to conditions existing in that year. We have no reason to question the correctness of the conclusion reached by us upon the proof submitted in the former case cited and in no facts in addition to those proved in that case are shown as to the year here in question we would hold that no affiliation existed. Petitioner, however, attempts to meet the situation by proving additional facts which it contends, when considered with the facts proven in the former case, and which are also proven on the present proceeding as existing in the taxable year now before us show, that the New Haven controlled substantially all the stock of petitioner in that year.

An examination of the facts found in the former proceeding and the evidence submitted in the present case show that similar conditions existed in the two years with respect to operation of petitioner's properties by the New Haven under the lease in question and the ownership by the [fol. 58] latter of 44 percent of petitioner's outstanding stock, it being the largest individual stockholder, the next largest stockholder owning 4,200 shares. In the former year it was shown that the 18 next largest stockholders owned a total of 10,521 shares and the balance of petitioner's 222,940 shares of stock outstanding was owned by 4,666 stockholders, none of whom owned individually more than 400 shares. In the present proceeding it is shown that the 18 next largest stockholders owned at the beginning of the year a total of 10,455, at the close a total of 10,327 shares, and that the balance of petitioner's outstanding

stock, which was the same as in the former year, was held by 4,819 stockholders, none of whom owned as many as 358 shares.

It will thus be seen that up to this point the proof as to the conditions existing in 1918 and 1921 are for all practical purposes the same and it is this proof which we held in the former proceeding as insufficient to show control by the New Haven of substantially all of petitioner's stock. However, petitioner, for the year before us presents additional proof, this being that during that year, in addition to the 98,132 shares, or 44 percent of petitioner's stock owned by the New Haven, 41,390 shares, or 18.56 percent was owned by 313 individuals, partnerships and corporations who, at the same time, owned or controlled 61,757 of the 1,571,179 shares of outstanding stock of the New Haven; that these stockholders usually gave their proxies to the representative of the New Haven in the stockholders' meetings; and that in the taxable year in question of the stock represented and voting at the annual stockholders' meeting, or 138,247 shares, was voted under proxy by three individuals who represented the New Haven interests, those proxies having in fact been given the New Haven.

It is insisted that these facts when considered with the others showing control of petitioner's properties under the lease and the absolute ownership by the New Haven of 44 percent of its stock and the wide distribution of the stockholdings in small individual amounts, are sufficient to prove [fol. 59] an actual control of substantially all of that stock by the New Haven.

With this view we cannot agree. At the most such proof would only indicate ownership and control through affiliated interests of 62.56 per cent of petitioner's stock even were we to consider that the New Haven controlled the additional 18.56 per cent of petitioner's stock by reason of the fact that it was owned by certain of its stockholders. However, the New Haven's stockholders, who were also stockholders of petitioner, owned only 61,757 or less than 4 per cent of the 1,571,179 shares outstanding of the New Haven's stock and the individual owners are not shown to have been connected with the New Haven in any way other than as owners of this comparatively small amount of its stock. No circumstances are shown which indicate a control by the New Haven of the stock owned by these indi-

viduals and the fact that in the annual stockholders' meeting for the taxable year some of those and certain other stockholders of petitioner gave to the New Haven's representative proxies to vote their stock does not indicate that such action was or could have been required of them. In petitioner's annual stockholders' meeting in 1921, there were 138,247 shares of stock voted, all of this being represented by proxies in the hands of the New Haven's representatives, 98,132 shares being the stock owned by the New Haven and the balance being the holdings of 138 small stockholders, some of them stockholders of the New Haven. The record shows nothing to indicate that the proxies of these 138 stockholders were given other than voluntarily, and the fact that in that year, and possibly in prior years, these proxies were voluntarily given, indicates an acquiescence and approval by these stockholders, in those years, of the control exercised by the New Haven of the organization of petitioner, but not control by it of the voting rights of the stock, which we have held is the "control" referred to in the statute. Isse Koch & Co., 1 B. T. A. 624. It will be also noted that almost 38 per cent of the outstanding stock [fol. 60] of petitioner during this year was owned by stockholders who had no manner of connection or community of interest with the New Haven.

In Ice Service Co., Inc., 9 B. T. A. 386, we held that a taxpayer owning approximately 68 per cent of the stock of another company which owed it large sums, whose notes were endorsed by it and whose business was completely controlled and dominated by the taxpayer through officers and directors elected by it, was not affiliated with such company in contemplation of section 240 (c) of the Revenue Act of 1921. In this case, in holding that the ownership of approximately 32 per cent of the stock by minority stockholders who had no connection with petitioner, and who retained the voting rights on their stock, precluded a claim of affiliation, we said of the minority stockholder:

* * * He still has the right to vote his stock and thus oppose the wishes of the majority if he so desires. True, the votes of the minority will not determine the policies of the corporation when the majority of the voting shares is held by one individual or corporation, but such control of the policies and financial affairs of the corporation as an entity does not amount to control of the individual stock-

holder or his stock. There must be a control of the voting rights. Appeal of Canyon Lumber Co., 1 B. T. A. 437; Adaskin-Tilley Furniture Co. v. Commissioner, 6 B. T. A. 316.

The Circuit Court of Appeals for the Second Circuit in approving the conclusion reached and affirming this decision, on appeal, Ice Service Co., Inc. v. Commissioner of Internal Revenue, 30 Fed. (2d) 230, said:

* * * The theory of affiliation, resulting in a consolidated return for taxes, is that the income and invested capital are really the income and capital of a single enterprise, though carried on through the instrumentality of several corporations. See article 631, Treasury Regula-
[fol. 61] tions (1920 Ed.) Holmes, Fed. Taxes (6th Ed.) 281; Alameda Inv. Co. v. McLaughlin, 38 F. (2d) 81 (D. C. N. D. Cal.). Only when the outside interest—that is, the interest of the minority—is so small as to be practically negligible, are the two corporations to be treated as in receipt of a single income, requiring a consolidated return.

It is undoubtedly true that under the terms of the lease in question, executed long prior to the income-taxing statutes, all of the obligations of both corporations of every character fall ultimately upon the New Haven and the income of both is produced by the New Haven in the operation of its owned and leased properties, and from an economic standpoint it may well be argued that for taxing purposes the income of both should be considered as one, but with that question we are not concerned. The two corporations are distinct entities and we may only construe and apply the law as enacted, and this provides the basis for affiliation, and the right to file a consolidated return, as ownership or control of substantially all of the stock. We hold that petitioner was not affiliated with the New Haven during the taxable year in question.

The last issue is upon respondent's action in including in petitioner's income various amounts representing in each case the difference between the cost of and amount received by the New Haven for leased properties of petitioner, sold by the lessee under authority of the lease, or taken by condemnation by Governmental authority.

The lease permits the New Haven to sell items of land and improvements from time to time when deemed by it

advisable. The proceeds of such sales are retained by it and the only obligation upon it is to replace such property sold with other property of an equal value. No increase in the rental is caused by such replacement. The New Haven also makes from time to time what in its judgment are necessary capital additions or improvements to the leased [fol. 62] property, advancing the funds therefor, and petitioner is required by the lease to issue bonds or stock when called upon by the New Haven, which are sold and the proceeds used to reimburse the latter for the advances made. The New Haven, in the case of such issue of stock or bonds, pays from that time forward an increased rental by reason of its obligation to pay all bond interest and $7 a share on all outstanding stock. Petitioner and the New Haven each carry an account on its books of the advances made by the latter for additions and improvements. This account usually represents a large amount and when, in the opinion of the New Haven, it reaches a sum justifying or calling for an issue of stock or bonds, the call for such issue is made. However, in the meantime the New Haven is from year to year making casual sales of items of the leased property which it deems are no longer needed and the practice has consistently been to credit the proceeds of such sales to this account of advances for additions and betterments, thus reducing to this extent the sum for which additional stock or bonds would be issued at some time in the future. It follows, we think, that from the date of the credit given by the New Haven and taken by petitioner the proceeds of such sales are represented by capital additions and improvements and that upon giving such credit the New Haven has complied with its lease obligation to replace such property sold with property of a similar value. The giving and taking of the credit against the accounts of advances shows that the parties have consistently considered such to have been the result. Petitioner has in each case, upon taking such credit against the New Haven account on its books, charged the difference between the cost of the property sold and the price realized to profit and loss, as a gain or loss, depending upon whether cost was below or above the price realized, and has carried such adjustment to its capital asset accounts.

Petitioner contends that in none of these sales, whether voluntary or by condemnation, is a profit or loss realized

[fol. 63] which may be reflected in its income in 1921, as such transactions, as to petitioner, represent not sales but exchanges of property falling within the exception provided by section 202 (c) of the Revenue Act of 1921, providing:

(c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized.

(1) When any such property held for investment, or for productive use in trade or business (not including stock-in-trade or other property held primarily for sale), is exchanged for property of a like kind or use; * * *

With respect to the items of gain included as pertaining to the condemnation of an easement by the City of Boston, and the taking of real estate by condemnation exercised by the Federal Government, petitioner contends that, it being on an accrual basis, in neither case, even though it should be found that the transactions were ones on which it realized taxable profits, were such profits income in the year 1921, but pertained to the year in which the properties were taken irrespective of the period in which the amount of compensation to be paid for the taking was determined, or the year in which such compensation was paid. It further contends with respect to the last mentioned item that the United States can not constitutionally reduce by taxation just compensation paid for property which it has taken.

In respect to the proceeds realized from the conversions under condemnation proceedings, and which constitute almost all of the amount in controversy under this issue, it is noted that the facts proven show that the entire amount realized in each instance was applied by the lessee to the cost of capital additions and improvements to petitioner's [fol. 64] property and this amount was, from the date received, represented by such capital additions. Section 234 (a) (14) of the Revenue Act of 1921 provides:

If property is compulsorily or involuntarily converted into cash or its equivalent as a result of * * * (c) an

exercise of the power of requisition or condemnation, or the threat or imminence thereof; and if the taxpayer proceeds forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, to expend the proceeds of such conversion in the acquisition of other property of a character similar or related in service or use to the property so converted, * * * or in the establishment of a replacement fund, then there shall be allowed as a deduction such portion of the gain derived as the portion of the proceeds so expended bears to the entire proceeds. * * *

Even though it should be concluded that these involuntary conversions resulted in a realization of taxable gain to petitioner, the immediate disposition of the entire proceeds of the sale by investment in property which is undoubtedly "of a character similar or related in service or use to the property so converted" would entitle petitioner to a deduction representing the entire amount of the gain realized, resulting in the elimination from its net taxable income of all of such gain.

However, the first question raised by petitioner, that all of the conversions are in fact, as to petitioner, exchanges of property and not sales, affects the entire amount. If petitioner is correct in this contention, no portion of the sale price received by the New Haven for these transfers of petitioner's properties can be included in petitioner's income.

Upon consideration of this question it appears to us unnecessary to pass upon the question of whether these transactions are ones falling within the provisions of section 202 (c) of the Revenue Act of 1921. Even if not ex- [fol. 65] changes of property for property of a like kind or use, the circumstances in our opinion show them to be transactions from which petitioner has derived no income.

The provisions of the lease in question show clearly that, as one of the considerations moving to it in return for the rental paid, the New Haven possesses the right to dispose of items of the leased property, whereupon it becomes obligated to replace them with similar property of an equal value. As a necessary incident of the exercise of this right by the New Haven it is provided that petitioner will at its request execute, through its officers, the necessary con-

veyances. The consideration paid by the purchaser secured by the New Haven is retained by the latter. The result to petitioner of the conversion is known and determined before the conveyance is made, this being that it will stand possessed of other assets of a character or use similar, and a value equal, to those conveyed. As we view those transactions the New Haven does not dispose of those items of property merely as an agent of petitioner but by its right acquired under the lease contract,—a right bought and paid for in the rental reserved. It does not receive the payments made for these properties as agent for petitioner, but in its own right as funds to which it has right and title, subject merely to its obligations to convey to petitioner similar property of an equal value to that which it has sold.

Respondent insists in effect that a disposition of property under the lease provision constituted two distinct and separate transactions; first, a sale and transfer of the property by petitioner through the New Haven as its agent, for a sum of money, and the receipt of the sum by the New Haven as such agent, and second, the investment of these proceeds of sale by petitioner, through its agent, in other property.

With this we do not agree. Petitioner has for a stated rental granted the New Haven the use of its properties for 99 years, and has given it the right to dispose of such items of property during that period as it deems to have [fol. 66] become unnecessary to the property as a whole and replace such items by ones of a similar value and for which a necessity exists. Does the fact that, during the course of the transaction under which such items of property are disposed of and replaced, the various steps and final result of which in each case are fixed and determined before the first step is taken, certain sums of money come into the hands of the New Haven, make such sums income to petitioner when it does not receive them and has no control over or disposition of them? In this connection it must be remembered that the use of these funds by the New Haven is in the discharge of its own obligation to replace the property conveyed.

We cannot agree with respondent that the several steps of this transaction constitute separate transactions, and that upon conveyance of the property by petitioner and

the receipt of the purchase price by the New Haven under the sale it has negotiated, the transaction is a closed one as to petitioner, who thereupon, for income tax purposes, is in receipt of the consideration paid. Compare United States v. Mollon, 279 Fed. 910 (aff. 281 Fed. 645). As we can see it petitioner has not then received its consideration, which is the property to be conveyed to it to replace that taken. It cannot be, in our opinion, charged with receipt of income in respect to the payment. At no time can it exercise an option by cancellation of the lease, and, instead of the replacement property, take the proceeds of the sale.

The court in Eisner v. Macomber, 252 U. S. 189, defines income as "not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived', that is received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal". We cannot see that petitioner, as a result of these disposals of property, has received anything meeting this definition.

[fol. 67] The effect of those transactions, insofar as petitioner is concerned, can be at the most merely an appreciation in value of petitioner's reversion, an unrealized capital gain, by reason of the fact that the leased property as a whole is rendered more usable and consequently of greater value to the lessee and such value may possibly be maintained beyond the lease term. To consider them sales of property by petitioner, and the proceeds as gross income to petitioner, is to overlook the fact, not only that the proceeds were received and used by the New Haven with no obligation upon its part except to replace the property at the expiration of the lease period of 99 years, but the fact that the property conveyed represents both the reversion of petitioner in such property and the leasehold interest therein belonging to the New Haven—its right to use for a remaining period of more than 70 years, which right would have a present value many times that of the reversion. Petitioner's participation in or use and enjoyment of any gain realized is necessarily postponed until the termination of the lease. It receives no increased rental by reason of the transactions.

The conclusion reached makes it unnecessary to pass upon the other questions raised by petitioner under this issue.

Reviewed by the Board.

Judgment will be entered pursuant to Rule 50.

Rundell dissents on the third point.

Now, November 18, 1930, the foregoing Findings of Fact and Opinion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[MEMORANDUM—Certified copy of lease is here omitted as it is already printed at pages 18 to 25, inclusive. A. I. Charron, Clerk.]

[fol. 68] BEFORE U. S. BOARD OF TAX APPEALS

NOTICE OF SETTLEMENT—Filed November 22, 1929

The following proposed settlement of the deficiency in the above-entitled case will be presented to the Board on ——, ——, at 9.30 a. m.:

Net income shown by deficiency notice		$1,732,971.65
Deduct items included in net income by respondent disallowed by Board:		
(1) Bond premium	$6,960.64	
(2) Profit on sales of real estate	7,888.13	
(3) Federal income taxes for 1921	157,542.88	
		172,391.65
Balance		$1,560,580.00
Add items to be included under Board's decision:		
(1) Federal income taxes for 1920 paid by lessee in 1921		155,339.49
Corrected net income		$1,715,919.49

Computation of Tax

Net income, $1,715,919.49—Taxable at 10%	171,591.95
Previously assessed	156,124.42
Deficiency	$15,467.53

This notice of proposed determination is submitted in accordance with the decision of the Board without prejudice to the petitioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

J. S. Y. Ivins, Counsel for Petitioner.

% Holmes, Brewster & Ivins, 815 Fifteenth Street, N. W., Washington, D .C.

[fol. 69] Now, November 18, 1930, the foregoing Notice of Settlement certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

Before U. S. Board of Tax Appeals

Order of Redetermination—Entered December 16, 1929

The above-entitled action came on for hearing on December 11, 1929, upon motion made on behalf of the petitioner for an order of final settlement of deficiency accompanied by a proposed recomputation thereof. There was no appearance in support of the motion on behalf of the petitioner. Arthur H. Murray, Esq., appeared on behalf of the respondent and made no objection to the form and amount of settlement as proposed by petitioner's counsel. Upon consideration of the proposed recomputation of the deficiency as proposed by petitioner's counsel it appears that the said recomputation is in all respects in accord with the findings of fact and conclusions of law promulgated on November 19, 1929. Now, therefore, upon consideration of the name and of all the records and files in this action, it is

Ordered, Adjudged, and Determined, that for the calendar year 1921 the deficiency is $15,467.53.

Enter.

Sumner L. Trussell, Member United States Board of Tax Appeals.

Washington, —— —, ——.

Now, November 18, 1930, the foregoing Order of Redetermination certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 70] BEFORE U. S. BOARD OF TAX APPEALS

MOTION FOR RECONSIDERATION—Filed January 28, 1930

Now comes the respondent, the Commissioner of Internal Revenue, in the above-entitled cause, by C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves that the Board reopen said cause in so far as it relates to bond premiums referred to in the second paragraph of the headnote of the decision of the Board promulgated November 29, 1929, and to reconsider the correctness of said decision for the following reason:

The opinion of the Board was based upon the same theory of law as that passed upon by it in the case of Old Colony Railroad Company v. Commissioner, Docket No. 7820, 6 B. T. A. 1025, which case involved the question of whether or not the amortized amount of bond premiums received prior to January 1, 1909, applicable to the year 1920, was income in said year 1920, whereas the facts presented in the present proceeding present the additional issue of whether or not said amortized portion of said bond premiums should not be given consideration in determining the interest deduction of the taxpayer for the purpose of determining its net taxable income. Said latter issue was not considered by the Board in its present decision.

The respondent further moves that the Board amend its findings of fact in relation to said bond premiums to in-

corporate in said findings of fact certain evidence presented by the respondent at the hearing and certain allegations of fact set forth in the petitioner's petition, admitted by the respondent in his answer, said additional findings of fact to consist of the following:

The petitioner in its income tax return for the year 1921 claimed as a deduction from gross income the sum of $538,920 as interest paid by the petitioner on the bonds issued between 1895 and 1904 on which premiums an aggregate of [fol. 71] $199,528.08 had been received at the time of sale. Said interest deduction of $538,920 represented the entire interest paid by the New Haven to the bondholders of the petitioner without any reduction to represent any portion of the amortization of the bond premiums received at the time said bonds were originally sold. Said deduction of $538,920 claimed by the petitioner in its income tax return for the calendar year 1921 was allowed in full by the respondent in determining the taxable income of the petitioner set forth in the deficiency letter, which was the basis of the petitioner's appeal to the Board.

Wherefore, the respondent prays that the Board will set aside and revoke its final order dated December 16, 1929, in the above-entitled cause, will reopen such portion of said cause as relates to bond premiums for the purpose of giving further consideration to the correctness of the deductions allowed by the Commissioner in determining the petitioner's net taxable income as shown in the deficiency letter and for the purpose of amending its previous findings of fact relative to the deduction of interest claimed by the petitioner in its income tax return and allowed by the Commissioner in his final determination of the petitioner's tax liability for the year 1921.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: L. A. Norman, J. W. Wideman, Special Attorneys, Bureau of Internal Revenue.

1/27/30.

Now, November 18, 1930, the foregoing Motion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 72] BEFORE U. S. BOARD OF TAX APPEALS

JOINT MOTION FOR RESCISSION OF FINAL ORDER—Filed and Granted May 24, 1930

The parties desiring to join in a request to the Board that it make additional findings of fact in this case, and it being desirable that the Board have opportunity to consider such additional findings in passing upon the respondent's motion (filed January 28, 1930) for reargument and reconsideration, counsel for both parties hereby respectfully

Jointly move that the Board vacate and set aside the order of redetermination entered herein on December 16, 1929, and hold the case for further proceedings under the joint request to be filed for additional findings of fact and on the respondent's said motion of January 28, 1930.

J. S. Y. Ivins, Counsel for Petitioner. C. M. Charest, General Counsel, Bureau for Internal Revenue, for Respondent.

May 23, 1930.

Now, November 18, 1930, the foregoing Motion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

STIPULATION—Filed June 11, 1930

It is hereby stipulated that the Board be requested to make the following additional finding of fact in this proceeding:

"During the year 1921 the New Haven paid to the bondholders of the petitioner the sum of $538,920.00 as interest on the bonds of the petitioner issued and sold between 1895 and 1904. Said bonds were the direct obligation of the petitioner to the owners of said bonds, and no agreement has [fol. 73] ever been executed between the petitioner and said bondholders releasing the petitioner from such direct lia-

bility to said bondholders on any of said bonds. In its income tax return for the year 1921, petitioner included this sum of $538,920.00 as an item of gross income and also took a deduction of the same sum of $538,920.00 from gross income as interest paid during the year. The Commissioner, in auditing petitioner's return for 1921, made no adjustment with respect to either such inclusion of $538,920.00 in gross income or such deduction of $538,920.00 therefrom, except by increasing petitioner's taxable income for the year by including therein the sum of $6,960.64, which is the amortized proportion for the year 1921 of the premiums received by the petitioner upon the sale of said bonds.

"Interest on the bonds sold at a premium between 1895 and 1904 was provided for by the following phraseology contained in said bonds. On coupon bonds:

'For value received the Old Colony Railroad Company promises to pay to the bearer hereof, or, in case of registration, to the registered holder, on the first day of December A. D. 1925, the sum of One Thousand Dollars ($1000) at the office of its Treasurer in the City of Boston, together with interest thereon at the rate of four per cent per annum, payable on the first days of June and December in each year on the presentation and surrender of the annexed coupons as they severally become due, said coupons to be paid to the bearer hereof whether this bond is registered or not, and the company may, but shall not be obliged to, require proof of ownership of any coupon before paying the same and payment thereof to the person presenting the same shall in any case discharge the company.'

"The form of coupon attached to said bonds was as follows:

[fol. 74] 'On the first day of June 1896, the Old Colony Railroad Company will pay to the bearer at the office of its Treasurer in the City of Boston, Twenty Dollars, being six months interest on its bond No. 0000.'

"On registered bonds:

'For value received the Old Colony Railroad Company promises to pay to —— —— Five Thousand Dollars on the first day of July A. D. 1932 at the office of its Treasurer

in the City of Boston, together with interest thereon at the rate of 3½ per cent per annum, payable at said office on the first days of January and July in each year to the registered owner of his order.'

"This phraseology, except for dates and accounts, was contained in all the bonds sold at a premium between 1895 and 1904."

J. S. Y. Ivins, Counsel for the Petitioner. C. M. Charest, General Counsel, Bureau of Internal Revenue.

So ordered June 11, 1930.

United States Board of Tax Appeals, by Charles P. Smith, Member.

LAN/ESK.

Now, November 18, 1930, the foregoing Stipulation certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

ORDER DENYING MOTION FOR RECONSIDERATION AND REINSTATING FINAL DETERMINATION—Entered June 19, 1930

The Board having entered its final order of redetermination herein, determining the deficiency in income and profits taxes of the petitioner for the year 1921 to be $15,467.53, such order having been entered on December 16, 1929; and [fol. 75] the respondent having filed a motion on January 28, 1930 for additional findings of fact and reconsideration of the issues, and L. A. Norman, Esq., for the respondent, in support of said motion, and J. S. Y. Ivins, Esq., for the petitioner, in opposition thereto, having been heard before Summer L. Trussell, member, at his chambers in Washington, on February 11, 1930, and the parties hereto having filed a joint motion for rescission of the final order of December 16, 1929 to permit amendment of the findings of fact, and said motion having been granted on May 24,

1930; and the findings of fact having been amended by the Board on June 11, 1930, in accordance with a stipulation and joint request of the parties, and due consideration having been had on the respondent's said motion for amendment of the findings and for reconsideration of the issues, filed January 28, 1930, such consideration being in the light of the findings as amended on June 11, 1930, as well as on all prior proceedings in this case, it is hereby

Ordered that respondent's said motion for amendment of the findings be denied, except in so far as the findings have already been amended by the action taken on June 11, 1930; and it is

Further ordered that said motion in so far as it requests reconsideration of the issues herein is hereby denied; and it is

Further ordered that the order of redetermination originally entered on December 16, 1929 and vacated by the order of May 24, 1930 be reinstated and restored as of this date.

Sumner L. Trussell, Member U. S. Board of Tax Appeals.

Now, November 18, 1930, the foregoing Order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

A true copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 76] BEFORE U. S. BOARD OF TAX APPEALS

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT—Filed September 29, 1930

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, General Counsel, Bureau

of Internal Revenue, and L. A. Norman, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I. Your petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. Your respondent on review (hereinafter referred to as the taxpayer) is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office at Boston, Massachusetts. Taxpayer's income tax return for the calendar year 1921 was filed with the Collector of Internal Revenue for the District of Massachusetts, whose office was located in the City of Boston, State of Massachusetts, and within the judicial circuit of the United States Circuit Court of Appeals for the First Circuit.

II. The Commissioner determined a deficiency in income taxes for the year 1921 in the amount of $17,172.75, and on May 29, 1926, in accordance with the provisions of Section 274 of the Revenue Act of 1926 sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, the taxpayer filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. The first hearing on said appeal by the said Board of Tax Appeals was held on August 3, 1928, which date is subsequent to the [fol. 77] Revenue Act of 1926. On November 19, 1929, the Board of Tax Appeals promulgated its findings of fact and opinion, and on December 16, 1929, entered its judgment and an order of redetermination in said appeal wherein and whereby the Board ordered and decided the amount of deficiency against the taxpayer for the calendar year 1921 to be $15,467.53. On January 28, 1930, the Commissioner filed a motion with the Board of Tax Appeals praying that said Board revise its findings of fact to include certain evidence presented at the hearing before said Board relating to the fact that the taxpayer in its income tax return had claimed a deduction from its gross income in the sum of $538,920 as interest paid by the taxpayer on certain bonds sold by the taxpayer between 1895 and 1904 on which premiums in the sum of $199,528.08 had been received at the time of sale, and that said claimed deduction of interest had been allowed by the Commissioner in his final determination of the taxpayer's tax liability for said year 1921.

On February 11, 1930, said motion was argued before Hon. Sumner L. Trussell, member of said Board of Tax Appeals. On June 11, 1930, said Board of Tax Appeals amended said findings of fact as moved by the Commissioner and in accordance with a stipulation entered into between the petitioner on review and the respondent on review, but refused to amend or revise its opinion as to the amount of the deficiency against the taxpayer for the calendar year 1921, and on June 19, 1930 re-entered its final order of redetermination as of said June 19, 1930.

III. Nature of controversy: That part of the deficiency, to wit, $696.06, which was in controversy before the Board of Tax Appeals resulted from the determination of the Commissioner that there should be included in the taxpayer's taxable net income for the calendar year 1921 a ratable portion of the premiums received by the taxpayer upon the issuance and sale in prior years of its bonds, such ratable proportion being determined by amortizing such [fol. 78] premiums over the periods of the respective lives of the bonds.

During the years 1895 to 1904, inclusive, the taxpayer issued and sold its bonds for divers amounts, receiving therefor, in addition to the face amount of such bonds, premiums aggregating $199,528.08. The taxpayer has been required by the Interstate Commerce Commission to amortize the said premiums over the periods of the respective lives of the bonds, and to report to the said Commission a ratable portion thereof as income each year. The taxpayer did not, however, report such amounts as income for the purposes of the federal income tax nor reduce the amount of the interest paid in connection with said bonds and claimed as a deduction from its gross income in the determination of its taxable income for the calendar year 1921. The taxpayer's accounts were kept upon the accrual basis. The amount of the ratable proportion of premiums for 1921 was $6,960.64, and this amount the Commissioner of Internal Revenue included in his determination of the taxpayer's taxable net income, and thereupon determined a deficiency for that year. From this determination the taxpayer appealed to the Board of Tax Appeals. The Board held that the Commissioner erred in treating the amount in question as income for the calendar year 1921, and in further denying Commissioner's contention that the same

should be used as a reduction of the amount of interest allowable as a deduction from the taxpayer's gross income in the determination of its taxable income for the year 1921.

IV. The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and final order of redetermi-
[fol. 79] nation and upon which he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board of Tax Appeals erred as a matter of law in holding that the pro rata portion of the premiums aggregating $199,528.08, which were applicable to the year 1921 in the amount of $6,960.64, should not properly be deducted from the amount of interest allowed to the taxpayer as a deduction from its gross income in the determination of its taxable income for said year 1921.

2. The Board erred in holding that amortization of the bond premiums in question was not required in the computation of the taxpayer's net taxable income for the year 1921.

3. The Board erred in not sustaining that portion of the deficiency in tax for the year 1921 relating to the amortization of the bond premiums in question as determined by the Commissioner.

G. A. Youngquist, Assistant Attorney General. C. M. Charest, General Counsel, Bureau of Internal Revenue. L. A. Narman, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by C. M. Charest. Jurat omitted in printing.

[fol. 80] Notice

To J. S. Y. Ivins, Esq., 315 15th Street N. W., Washington, D. C., attorney for respondent on review:

Notice is hereby given to you that the Commisioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the twenty-ninth day of September, 1930, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review of the Board's decision by the United States Circuit Court of Appeals for the First Circuit, a copy of which said petition for review as filed is herewith served upon you.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and of a copy of the petition for review mentioned in said notice is acknowledged this thirtieth day of September, 1930.

J. S. Y. Ivins, Attorney for Respondent on Review.

Now, November 18, 1930, the foregoing Petition for Review and Notice of filing certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 81] BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE—Filed October 9, 1930

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit, copies, duly certified as correct, of the following documents and records in the above-entitled cause in connection with the petition for review by the said United States Circuit Court of Appeals for the First Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Petition filed with the Board on July 23, 1926.
3. Commissioner's answer filed with the Board on September 21, 1926.
4. "Motion for Permission to File Amended Petition" filed with the Board on July 25, 1928 and order granting the same entered on the same date.

5. Amended petition filed with the Board on July 25, 1928.

6. Answer to amended petition filed with the Board on July 25, 1928.

7. "Motion for Severance of Issues and Limitation of Hearing to Certain Issues" filed with the Board on August 3, 1928 and order granting the same entered upon the same date.

8. "Findings of Fact and Opinion" promulgated November 19, 1929.

9. "Notice of Settlement" filed by the petitioner with the Board on November 22, 1929.

10. "Order of Redetermination" entered by the Board on December 16, 1929.

11. Motion filed by the Commissioner of Internal Revenue on January 28, 1930.

12. "Joint Motion for Rescission of Final Order", filed [fol. 82] with the Board on May 24, 1930, and order granting the same entered on the same date.

13. Stipulation filed with the Board on June 11, 1930 and order entered pursuant thereto upon the same date.

14. Order denying motion for reconsideration and reinstating final determination entered June 19, 1930.

15. "Petition for Review", filed with the Board on September 29, 1930, together with Notice of Filing Petition for Review and acknowledgment of service thereon filed with the Board on October 1, 1930.

16. This Præcipe.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, November 18, 1930, the foregoing Præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE—Filed October 16, 1930

To the clerk of the United States Board of Tax Appeals:

In addition to the papers indicated in the præcipe for record filed with you on October 9, 1930, by the General

Counsel for the Commissioner of Internal Revenue, petitioner-on-review, you will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the First Circuit (1) a duly certified copy of the lease dated March 1, 1893, from the Old Colony Railroad Company to the New York, New Haven and Hartford Railroad Company, which lease appears in the findings of fact in the case of Appeal of Old Colony Railroad Company, Docket No. 1024, 1 B. T. A. 1066, said lease being printed on pages 1068, 1069, 1070 and 1071 of Volume 1 B. T. A.

This lease is a part of the findings of fact of the Board in [fols. 83 & 84] the instant case, being incorporated therein by reference. (See last paragraph on page 268, 18 B. T. A.)

It is suggested that said lease be marked "8 (a)" and included in the record following the findings of fact and opinion of the Board.

Please also include in said record (2) a copy of this præcipe.

J. S. Y. Ivins, Attorney for Respondent on Review.

Now, November 18, 1930, the foregoing Præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 85] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1930

No. 2515

COMMISSIONER OF INTERNAL REVENUE

v.

OLD COLONY RAILROAD COMPANY, Petitioner for Review

Appeal from Board of Tax Appeals

Before Bingham, Wilson, and Lowell, JJ.

OPINION OF THE COURT—Filed June 10, 1931

LOWELL, J:

This is an appeal by the Commissioner of Internal Revenue from a decision of the Board of Tax Appeals. The suit

Upon consideration whereof, It is now, to wit, June 10, 1931, here ordered, adjudged and decreed as follows:
[fol. 88] The order or decision of the Board of Tax Appeals is reversed and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on August 11, 1931, mandate issued to the United States Board of Tax Appeals.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1303)